(24,548)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1914.

## No. 804.

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THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

J. T. BIGGER ET AL.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings had and done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1914, at Fort Worth, Texas, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Rhydon M. Call, District Judge.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
J. T. BIGGER et al., Defendants in Error.

Be It Remembered, that heretofore, to-wit, on the 16th day of May, A. D. 1914, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Western District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2648, as follows:

## CAPTION

In the United States of America, Western District of Texas, San Antonio Division.

*Be It Remembered* that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Thomas S. Maxey, United States District Judge, presiding, and holding its sessions at San Antonio, Texas, and which term began on the 15th day of December A. D. 1913, and adjourned on the 20th day of December 1913, until the 5th day of January, 1914, and continued in session to and including the 23rd day of January 1914, there came on to be heard and determined, amongst other causes pending on the docket, the following case:

J. T. Bigger,
vs.
International & Great Northern Railway Company, et al

## TRANSCRIPT FROM DISTRICT COURT OF BEXAR COUNTY.

### CAPTION.

THE STATE OF TEXAS,
County of Bexar.

At a Regular Term of the District Court of the 57th Judicial District, begun and holden within and for the County of Bexar, and State of Texas, before the Hon. R. B. Minor, Judge thereof presiding and which opened on the 3rd day of February, A. D. 1913,

and which will close on the 5th day of April, A. D. 1913, the petition for removal to the Federal Court in the following cause came on for trial, to-wit:

No. B—4936

J. T. BIGGER, PLAINTIFF.
vs.
I. & G. N. RY. CO. ET AL., DEFENDANTS.

ORIGINAL PETITION.

THE STATE OF TEXAS
County of Bexar.
No. B—4936

In the District Court, 57th Judicial District,
Bexar County, Texas.

*To the Honorable Judge of said Court*:

Your petitioner J. T. Bigger, hereinafter styled plaintiff complains of International & Great Northern Railway Company, Texas & Pacific Railway Company, and St. Louis Iron Mountain & Southern Railway Company, hereinafter styled defendants, and respectfully represents to the court:

That the plaintiff is now and on the date hereinafter mentioned was a resident of Bexar County, Texas; that the defendant International & Great Northern Railway Company, is a railroad corporation duly incorporated under the laws of the State of Texas, and is now and was at the time plaintiff was injured operating a line of railway running from Longview, Texas, to San Antonio, Texas, and elsewhere, in the State of Texas, and has an agent in Bexar County, Texas, upon who service of cita-

tion may be had; that the defendant Texas & Pacific Railway Company, is a railroad corporation duly incorporated and operates a line of railway from Texarkana, to Longview, Texas, and to other points in the State of Texas, that it has an agent in Dallas County, Texas, upon who service of citation may be had in this cause; that the St. Louis Iron Mountain & Southern Railway Company, is a foreign corporation, and operates a line of railway through the States from Texarkana, Arkansas, to the city of St. Louis in Missouri; that all of said defendants are common carriers of passengers for hire, and said defendants operate a continuous line of railway from the city of San Antonio, Texas, to the city of St. Louis, Missouri; that the said defendants, so plaintiff is informed and believes, upon the date hereinafter mentioned, had a partnership agreement under which agreement the agent of said defendant International & Great Northern Railway Company, who sold the passenger ticket to plaintiff, was acting as the agent of all of the defendants, and that each and all of said defendants were doing business in the State of Texas, through some one or all of the other constituting said partnership: that the agent of the International & Great Northern Railway Company who sold the passenger ticket hereinafter mentioned, to the plaintiff, was also the agent and acted for the benefit of the Texas & Pacific Railway Company, and the St. Louis Iron Mountain & Southern Railway Company, and service upon each defendant may be had by serving the agent of the defendant International & Great Northern Railway Company, who sold the ticket to plaintiff as hereinafter set out.

Plaintiff avers that heretofore, to-wit: on or about the 10th day of July, 1912, being desirous of being

transported to the city of Owensboro, Kentucky, from the city of San Antonio, Texas, and return, purchased a ticket from the defendant International & Great Northern Railway Company the same being a through round trip ticket over line of the said International & Great Northern Railway Company and over the lines owned and operated by the aforesaid defendants, and in the sale of the said ticket to plaintiff, the said International & Great Northern Railway Company acted for its-self, and as the agent of all the aforesaid defendants, and in pursuance of the partnership agreement existing between all of the defendants, the said International & Great Northern Railway Company, acted for, and represented all of the defendant corporations constituting said partnership in the sale of tickets, and that all of aforementioned defendants acquiesced in and accepted the benefits of said sale to said ticket, and honored the same as a valid and proper ticket, by permitting the said plaintiff to ride on its train as a passenger; that by reason of the price paid for said ticket, it became the defendants duty to safely transport the plaintiff from the city of San Antonio, Texas, to Owensboro, Kentucky, and return.

Plaintiff avers that on or about the 10th day of August, 1912, plaintiff was returning from Owensboro, Kentucky, to San Antonio, Texas, on the said ticket, which said return was provided for in said ticket, and that by virtue of said ticket he was a passenger on the line of the defendant Texas & Pacific Railway Company, that while he was a passenger on said defendant's train, said train came to a stop at or near the station of Longview, Texas, that at said time it was raining, and had been raining for some time prior thereto, and the ground was covered with

a solid sheet of water; that after the train came to a stop, the said defendant's employees, in charge of the train negligently ordered and commanded the plaintiff to leave the said train in said rain and water, and plaintiff was compelled to so leave said train, and thus, be exposed to said rain and water, whereby he was thoroughly drenched, and by reason of said exposure and drenching he became violently ill and suffered severely.

Plaintiff avers that the train of the Texas & Pacific Railway Company, upon which he was a passenger from Texarkana, Texas, until it reached the point near Longview, where it stopped, had a passenger coach attached, which continued beyond Longview over the line of defendant International & Great Northern Railway Company, and as far as San Antonio, Texas, that the defendant, its servants and employees, knew that plaintiff's destination point was San Antonio, Texas, yet, notwithstanding such knowledge they negligently failed to inform or notify plaintiff that this through passenger coach was in said train upon which he was riding, and negligently failed to give plaintiff an opportunity to safely enter said car while the same was attached to the train upon which he was a passenger, by passing through the other cars in said train to said through car; that defendant's were further guilty of negligence in ordering, commanding and compelling plaintiff to leave said passenger train of the Texas & Pacific Railway Company, in said down pouring rain and water covered ground and in not providing reasonably safe and protected place for plaintiff to alight: that the aforesaid acts of the defendants in so negligently exposing plaintiff to said rain and water directly and solely caused him the injuries, sickness

and suffering hereinafter set out, without any fault whatever on his part.

Plaintiff avers that by reason of being so negligently exposed to said rain and water, his clothes became thoroughly wet, and he was compelled to ride on to San Antonio, Texas, in this condition; that by reason of said exposure he contracted a severe cold and high fever, and became violently ill, and caused pleurisy with effusion; that said exposion seriously affected plaintiff's lungs and head, and seriously lowered plaintiff's general vitality; that by reason of said condition so negligently brought about by defendants, plaintiff's general health has been so greatly impaired so as to render him a perfect physical wreck, and he is now a hopeless invalid; that by reason of said injuries and illness plaintiff has been confined constantly to his home and bed; that his nervous system has been wrecked and he is unable by reason of his condition to obtain restful sleep by day or night, and by reason of said injuries and illness he has suffered great and excruciating mental, and physical pain, and for the balance of his life he will suffer such pain.

Plaintiff avers that prior to his injuries he was a strong and industrious man, able to perform physical labor, and was earning, and was capable of earning the sum of about $200.00, per month, which earning capacity he had a reasonable expectancy of increasing in the future, but by reason of said injuries and sickness, so negligently caused by the defendants, he has been wholly unable to perform labor of any kind or to earn money, and his expectancy to labor and to earn money in the future has been permanently destroyed, and by reason of the premises, plaintiff has been damaged in the sum of $30,000.00.

PREMISES CONSIDERED, plaintiff prays that defendants be cited to appear and answer herein, that upon a trial hereof he have judgment for his said damages, together with costs and general relief.

CLAUD J. CARTER,
ERNEST FELLBAUM,
Attorneys for Plaintiff.

Filed Dec. 5, 1912. Andres Coy, Jr. District Clerk, Bexar County, Texas. By Garvin C. Legan, Deputy.

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## CITATION.

THE STATE OF TEXAS,
County of Bexar.

The State of Texas to the Sheriff or any Constable of Dallas County, GREETING:

You are hereby commanded to summon Texas & Pacific Railway Company, a corporation, to be and appear at the next Regular Term of the Honorable District Court of the 57th Judicial District of Texas in and for Bexar County, to be holden at the Court House thereof, in the city of San Antonio, on the first Monday in Feby., A. D. 1913, the same being the 3rd day of Feby., A. D. 1913, then and there to answer a petition filed in said Court on the 5th day of Dec. A. D. 1912, in a suit numbered on the Docket of said Court No. B—4936 wherein J. T. Bigger is Plaintiff and International & Great Northern Railway Company; Texas & Pacific Railway Company and St. Louis Iron Mountain & Southern Railway Company; (all of which are corporations) are

Defendants; the nature of the Plaintiff's demand being substantially as follows, to-wit:

July 10, 1912, plff. purchased from the ticket agent of the International & Great Northern Railway Company, a thru round trip ticket over said line and the other two deft. lines, from San Antonio, Texas, to Owensboro, Kentucky, and return. That on August 10th, 1912, while returning on the Texas & Pacific Railway Company's line, he was commanded to alight in a heavy rain, and that the deft. negligently failed to provide a safe place for him to alight. That there was a thru coach on said train to San Antonio, Texas, but deft. failed to tell this plff. of the fact, but commanded him to alight in said rain. That plff. had to ride on to San Antonio in said wet clothes and by reason of said negligence plaintiff contracted a severe illness. That plff. is now a helpless invalid, to his damage $30,000.00. That prior to said injuries plff. was earning $200 per month, but now is a helpless invalid and capable of earning nothing.

Whereof, plff. prays for judgment for his damages; costs and for general and special relief. That the defendants are connecting common carriers of passengers for hire, and you will deliver to the Defendant Texas & Pacific Railway Company, a corporation, a true copy of this writ, together with the accompanying certified copy of the Plaintiffs Original Petition.

HEREIN FAIL NOT, but have you before said Court on the first day of the next term thereof, this writ with your return thereon showing how you have executed the same.

WITNESS, Andres Coy, Jr., Clerk of the District Courts in and for Bexar County, Texas.

Given under my hand and Seal of said Court, at

office in the city of San Antonio, this the 10th day of Jany. A. D. 1913.

(Seal) ANDRES COY, JR.
(Issued same day) Clerk of the District Courts,
Bexar, Co., Texas. By Garvin C. Legan, Deputy.

RETURN OF OFFICER.

Came to hand 13 day of Jany., A. D. 1913, at 8 o'clock a. m., and executed 13 day of Jany., A. D. 1913, in Dallas at 11 o'clock a. m., by delivering to Texas & Pacific Railway Company, a corporation by delivering to J. C. Webb, agent, in person, a true copy of this citation, together with a certified copy of the Plaintiff's original petition.

I traveled 5 miles in the execution of this writ.

R. F. BRANDENBURG,

Sheriff of Dallas County, Texas. By W. H. Belt, Deputy.

Fees: Serving 1 writ, $ .75; mileage 5, $ .25; total, $1.00;

ENDORSEMENTS.

57th Judicial District Court in and for Bexar County Texas.

No. B—4936
J. T. Biggers
versus
I. & G. N. Ry. Co., et al

Citation

Filed Jany 20, A. D. 1913. Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas. By Henry Arnold, Deputy.

## CITATION

THE STATE OF TEXAS,
County of Bexar.

The State of Texas to the Sheriff or any Constable of Bexar County, GREETING:

You are hereby commanded to summon St. Louis Iron Mountain & Southern Railway Company, a corporation, to be and appear at the next Regular Term of the Honorable District Court of the 57th Judicial District of Texas in and for Bexar County, to be holden at the Court House thereof, in the city of San Antonio, on the first Monday in Feby., A. D. 1913, the same being the 3rd day of Feby., A. D. 1913, then and there to answer a petition filed in the said Court on the 5th day of Dec. A. D. 1912, in a suit numbered on the Docket of said Court No. B—4936 wherein J. T. Bigger is Plaintiff, and International & Great Northern Railway Company; Texas & Pacific Railway Company; and St. Louis Iron Mountain & Southern Railway Company; (all corporations) are Defendants; the nature of the Plaintiff's demand being substantially as follows, to-wit:

July 10, 1912, plff purchased from the ticket agent of the International & Great Northern Railway Company, a thru round trip ticket over said line and the other two deft. lines, from San Antonio, Texas, to Owensboro, Kentucky, and return. That on Aug. 10, 1912, while returning on the Texas & Pacific Railway Company's line, he was commanded to alight in a heavy rain, and that the deft. negligently failed to provide a safe place for him to alight. That there was a thru coach on said train to San Antonio, Texas, but deft. failed to tell this plff of the fact, but commanded him to alight in said rain. That plff. had to

ride on to San Antonio in said wet clothes and by reason of said negligence plaintiff contracted a severe illness. That plff. is now a helpless invalid, to his damage $30,000. That prior to said injuries plff. was earning $200 per month, but now is a helpless invalid and capable of earning nothing.

WHEREFORE, Plff. prays for judgment for his damages; costs and for general and special relief. That the defendants are connecting common carriers of passengers for hire, and you will deliver to the Defendant St. Louis Iron Mountain & Southern Railway Company, a corporation, by serving upon the Ticket-Agent of the International & Great Northern Railway Company, a true copy of this writ.

HEREIN FAIL NOT, but have you before said Court on the first day of the next term thereof, this writ with your return thereon, showing how you have executed the same.

WITNESS, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.

Given under my hand and Seal of said courts, at office in the City of San Antonio, this the 11th day of Jany., A. D. 1913.

(Seal) ANDRES COY, JR.,
(Issued same day) Clerk of the District Courts of Bexar County, Texas. By Garvin C. Legan, Deputy.

RETURN OF OFFICER

Came to hand 11 day of Jan., A. D., 1913, at 9 o'clock a. m., and executed 13 day of Jan., A. D. 1913, in San Antonio, at 3 o'clock p. m., by delivering to defendant St. Louis Iron Mountain & Southern Railway Company, a corporation, through its agent W.

L. Holder, who is local agent in San Antonio, Bexar County, Texas, in person, a true copy of this citation.

I traveled 1 mile in the execution of this writ.

JNO. W. TOBIN,

Sheriff of Bexar County, Texas. By A. Newton, Jr., Deputy.

Fees: Serving 1 writ $ .75; mileage—; total, $ .75.

ENDORSEMENTS.

57th Judicial District
No. B—4936
J. T. Bigger
versus
I. & G. N. Ry. Co., et al

Citation

Filed Jany 15, A. D. 1913, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.
By Henry Arnold, Deputy.

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CITATION.

THE STATE OF TEXAS,
County of Bexar.

The State of Texas to the Sheriff or any Constable of Bexar County, GREETING:

You are hereby commanded to summon Internation & Great Northern Railway Company, a corporation, to be and appear at the next Regular Term of the Honorable District Court of the 57th Judicial

District of Texas in and for Bexar County, to be holden at the Court House thereof, in the city of San Antonio, on the first Monday in Feby., A. D. 1913, the same being the 3rd day of Feby., A. D. 1913, then and there to answer a petition filed in the said Court on the 5th day of Dec., A. D. 1912, in a suit numbered on the Docket of said Court No. B—4936 wherein J. T. Bigger is Plaintiff, and International & Great Northern Railway Company; Texas & Pacific Railway Company; and St. Louis Iron Mountain & Southern Railway Company; (all corporations) are Defendants; the nature of the Plaintiff's demand being substantially as follows, to-wit:

July 10, 1912, plff. purchased from the ticket agent of the International & Great Northern Railway Company. a thru round trip ticket over said line and the other two deft. lines, from San Antonio, Texas, to Owensboro, Kentucky, and return. That on Aug. 10th, 1912, while returning on the Texas & Pacific Railway Company's line, he was commanded to alight in a heavy rain, and that the deft. negligently failed to provide a safe place for him to alight. That there was a thru coach on said train to San Antonio, Texas, but deft. failed to tell this plff. of the fact, but commanded him to alight in said rain. That plff. had to ride on to San Antonio in said wet clothes and by reason of said negligence plaintiff contracted a severe illness. That plff. is now a helpless invalid, to his damage $30,000.00. That prior to said injuries plff. was earning $200 per month, but now is a helpless invalid and capable of earning nothing.

WHEREFORE, plff. prays for judgment for his damages: costs and for general and special relief. That the defendants are connecting common carriers of passengers for hire.

And you will deliver to the Defendant International & Great Northern Railway Company, a corporation, a true copy of this writ.

HEREIN FAIL NOT, but have you before said Court on the first day of the next term thereof, this writ with your return thereon, showing how you have executed the same.

WITNESS, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.

Given under my hand and Seal of said Courts, at office in the city of San Antonio, this the 11th day of Jany., A. D. 1913.

(Seal) ANDRES COY, JR.

(Issued same day) Clerk of the District Courts of Bexar Co. Tex. By Garvin C. Legan, Deputy.

RETURN OF OFFICER.

Came to hand 11 day of Jan., A. D. 1913, at 9 o'clock a. m., and executed 13 day of Jan., A. D. 1913, in San Antonio, at 3 o'clock p. m., by delivering to defendant, International & Great Northern Railway Company, a corporation. through its agent W. L. Holder, who is local agent in an Antonio, Bexar County, Texas, in person, a true copy of this citation.

I traveled——miles in the execution of this writ.

JNO. W. TOBIN,

Sheriff of Bexar County, Texas. By A. Newton, Jr., Deputy.

Fees: Serving 1 writ, $ .75; mileage,——; total, $ .75.

ENDORSEMENTS.

57th Judicial District
No. B—4936
J. T. Bigger
versus
I. & G. N. Ry. Co et al.

Citation.

Filed Jany. 15, A. D. 1913. Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.
By Henry Arnold, Deputy.

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CITATION.

THE STATE OF TEXAS,
County of Bexar.

The State of Texas to the Sheriff or any Constable of Bexar County, GREETING:

You are hereby commanded to summon Texas & Pacific Railway Company, a corporation, to be and appear at the next Regular Term of the Honorable District Court of the 57th Judicial District of Texas in and for Bexar County, to be holden at the Court House thereof, in the city of San Antonio, on the first Monday in Feby., A. D. 1913, the same being the 3rd day of Feby., A. D. 1913, then and there to answer a petition filed in the said Court on the 5th day of Dec. A. D. 1912, in a suit numbered on the Docket of said Court No. B—4936 wherein J. T. Bigger is Plaintiff, and International & Great Northern Railway Company; Texas & Pacific Railway Company; and St. Louis Iron Mountain & Southern Railway

Company; (all corporations) are Defendants; the nature of the Plaintiff's demand being substantially as follows, to-wit:

July 10, 1912, plff. purchased from the ticket agent of the International & Great Northern Railway Company, a thru round trip ticket over said line and the other two deft, lines, from San Antonio, Texas, to Owensboro, Kentucky, and return. That on Aug. 10, 1912, while returning on the Texas & Pacific Railway Company's line, he was commanded to alight in a heavy rain, and that the deft. negligently failed to provide a safe place for him to alight. That there was a thru coach on said train to San Antonio, Texas, but deft failed to tell this plff. of the fact, but commanded him to alight in said rain. That plff. had to ride on to San Antonio in said wet clothes and by reason of said negligence plaintiff contracted a severe illness. That plff. is now a helpless invalid, to his damage $30,000.00. That prior to said injuries plff. was earning $200. per month, but now is a helpless invalid and capable of earning nothing.

Wherefore, plff. prays for judgment for his damages; costs and for general and special relief. That the defendants are connecting common carriers of passengers for hire, and you will deliver to the Defendant Texas and Pacific Railway Company, a corporation, by serving upon the Ticket agent of the International and Great Northern Railway Company, a true copy of this writ.

HEREIN FAIL NOT, but have you before said Court on the first day of the next term thereof, this writ with your return thereon, showing how you have executed the same.

WITNESS, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.

POOR COPY

Given under my hand and Seal of said Courts, at office in the city of San Antonio, this the 11th day of Jany., A. D. 1913.

(Seal) ANDRES COY, JR.

(Issued same day) Clerk of the District Courts of Bexar County, Texas. By Garvin C. Legan, Deputy.

RETURN OF OFFICER

Came to hand 11 day of Jan. A. D. 1913, at 9 o'clock a. m., and executed 13 day of Jan., A. D. 1913, in San Antonio, at 3 o'clock p. m., by delivering to defendant, Texas and Pacific Railway Company, a corporation, through its agent W. L. Holder, who is local agent in San Antonio, Bexar County, Texas, in person, a true copy of this citation.

I traveled 3 miles in the execution of this writ.

JNO. W. TOBIN,

Sheriff of Bexar County, Texas. By A. Newton, Jr., Deputy.

Fees: Serving 1 writ, $ .75; mileage 3, $ .15; total, $ .90.

ENDORSEMENTS.

57th Judicial District
No. B—4936
J. T. Bigger
versus
I. & G. N. Ry. Co. et al

Citation

Filed Jany 15, A. D. 1913. Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas. By Henry Arnold, Deputy.

## CITATION.

THE STATE OF TEXAS,
County of Bexar.

The State of Texas to the Sheriff or any Constable of Bexar County, GREETING:

You are hereby commanded to summon St. Louis Iron Mountain and Southern Railway Company, a corporation, to be and appear at the next Regular Term of the Honorable District Court of the 57th Judicial District in and for Bexar County, to be holden at the Court House thereof, in the city of San Antonio on the first Monday in Feby., A. D. 1913, the same being the 3rd day of Feby., A. D. 1913, then and there to answer a petition filed in the said Court on the 5th day of Dec. A. D. 1912, in a suit numbered on the Docket of said Court No. B—4936 wherein J. T. Bigger is Plaintiff, and International & Great Northern Railway Company; Texas & Pacific Railway Company; and St. Louis Iron Mountain & Southern Railway Company; (all corporations) are Defendants; the nature of the Plaintiff's demand being substantially as follows, to-wit:

July 10, 1912, plff. purchased from the ticket agent of the International & Great Northern Railway Company, a thru round trip ticket over said line and the other two deft, lines, from San Antonio, Texas, to Owensboro, Kentucky, and return. That on Aug. 10, 1912, while returning on the Texas & Pacific Railway Company's line, he was commanded to alight in a heavy rain, and that the deft. negligently failed to provide a safe place for him to alight. That there was a thru coach on said train to San Antonio, Texas, but deft failed to tell this plff. of the fact,

but commanded him to alight in said rain. That plff. had to ride on to San Antonio in said wet clothes and by reason of said negligence plaintiff contracted a severe illness. That plff. is now a helpless invalid, to his damage $30,000.00. That prior to said injuries plff. was earning $200. per month, but now is a helpless invalid and capable of earning nothing.

Wherefore, plff. prays for judgment for his damages; costs and for general and special relief. That the defendants are connecting common carriers of passengers for hire, and you will deliver to the Defendant St. Louis Iron Mountain & Southern Railway Company, a corporation, by serving upon the Ticket-agent of the International & Great Northern Railway Company, a true copy of this writ.

HEREIN FAIL NOT, but have you before said Court on the first day of the next term thereof, this writ with your return thereon, showing how you have executed the same.

WITNESS, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.

Given under my hand and Seal of said Courts, at office in the city of San Antonio, this the 16th day of Jany., A. D. 1913.

(Seal) ANDRES COY, JR.

(Issued same day) Clerk of the District Courts of Bexar County, Texas. By Garvin C. Legan, Deputy.

## RETURN OF OFFICER

Came to hand 16th day of January, A. D. 1913, at 10 o'clock a. m., and executed 16 day of January, A. D. 1913, in San Antonio, Texas, at 6 o'clock p. m., by delivering to defendant St. Louis Iron Mountain & Southern Railway Company, a corporation, through its agent, G. M. Bynum, who is local ticket

agent in San Antonio, Bexar County, Texas, in person, a true copy of this citation.

I traveled——miles in the execution of this writ.

JNO. W. TOBIN,

Sheriff of Bexar County, Texas. By A. Newton, Jr., Deputy.

Fees: Serving 1 writ, $ .75; mileage,——; total $ .75.

ENDORSEMENTS.

57th Judicial District
No. B—4936
J. T. Bigger
versus
I. & G. N. Ry. Co. et al

Citation

Filed Jany. 17, A. D. 1913. Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.
By M. J. Stuart, Deputy.

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CITATION.

THE STATE OF TEXAS,
County of Bexar.

The State of Texas to the Sheriff or any Constable of Bexar County, GREETING:

You are hereby commanded to summon International & Great Northern Railway Company, a corporation, to be and appear at the next Regular Term of the Honorable District Court of the 57th Judicial

District of Texas in and for Bexar County, to be holden at the Court House thereof, in the city of San Antonio, on the first Monday in Feby., A. D. 1913, the same being the 3rd day of Feby. A. D. 1913, then and there to answer a petition filed in the said Court on the 5th day of Dec. A. D. 1912, in a suit numbered on the Docket of said Court No. B—4936 wherein J. T. Bigger is Plaintiff, and International & Great Northern Railway Company; Texas & Pacific Railway Company; and St. Louis Iron Mountain & Southern Railway Company; (all corporations) are Defendants; the nature of the Plaintiff's demand being substantially as follows, to-wit:

July 10, 1912, plff. purchased from the ticket agent of the International & Great Northern Railway Company, a thru round trip ticket over said line and the other two deft, lines, from San Antonio, Texas, to Owensboro, Kentucky, and return. That on Aug. 10, 1912, while returning on the Texas & Pacific Railway Company's line, he was commanded to alight in a heavy rain, and that the deft. negligently failed to provide a safe place for him to alight. That there was a thru coach on said train to San Antonio, Texas, but deft failed to tell this plff. of the fact, but commanded him to alight in said rain. That plff. had to ride on to San Antonio in said wet clothes and by reason of said negligence plaintiff contracted a severe illness. That plff. is now a helpless invalid, to his damage $30,000.00. That prior to said injuries plff. was earning $200. per month, but now is a helpless invalid and capable of earning nothing.

Wherefore, plff. prays for judgment for his damages; costs and for general and special relief. That the defendants are connecting common carriers of

passengers for hire, and you will deliver to the Defendant International & Great Northern Railway Company, a corporation, a true copy of this writ.

HEREIN FAIL NOT, but have you before said Court on the first day of the next term thereof, this writ with your return thereon, showing how you have executed the same.

WITNESS, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.

Given under my hand and Seal of said Courts, at office in the city of San Antonio, this the 16th day of Jany., A. D. 1913.

(Seal) ANDRES COY, JR.

(Issued same day) Clerk of District Courts of Bexar County, Texas. By Garvin C. Legan, Deputy.

## RETURN OF OFFICER

Came to hand 16th day of January, A. D. 1913, at 10 o'clock a. m. and executed 16 day of January, A. D. 1913, in San Antonio, Texas, at 6 o'clock p. m., by delivering to defendant, International & Great Northern Railway Company, a corporation, through its agent, G. M. Bynum, who is local ticket agent in San Antonio, Bexar County, Texas, in person, a true copy of this citation.

I traveled——miles in the execution of this writ.

JNO. W. TOBIN,

Sheriff of Bexar County, Texas. By A. Newton, Jr., Deputy.

Fees: Serving 1 writ, $ .75; mileage,——; total $ .75.

ENDORSEMENTS.

57th Judicial District
No. B—4936
J. T. Bigger
versus
I. & G. N. Ry. Co. et al

Citation

Filed Jany 17, A. D. 1913. Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.
By M. J. Stuart, Deputy.

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CITATION.

THE STATE OF TEXAS,
County of Bexar.

The State of Texas to the Sheriff or any Constable of Bexar County, GREETING:

You are hereby commanded to summon Texas & Pacific Railway Company, a corporation, to be and appear at the next Regular Term of the Honorable District Court of the 57th Judicial District of Texas in and for Bexar County, to be holden at the Court House thereof, in the City of San Antonio, on the first Monday in Feby., A. D. 1913, the same being the 3rd day of Feby., A. D. 1913, then and there to answer a petition filed in the said court on the 5th day of Dec., A. D. 1912, in a suit numbered on the Docket of said Court No. B—4936 wherein J. T. Bigger is Plaintiff, and International & Great Northern Railway Company; Texas and Pacific Railway Compa-

ny; and St. Louis Iron Mountain & Southern Railway Company; (all corporations) are Defendants; the nature of the Plaintiff's demand being substantially as follows, to-wit:

July 10, 1912, Plff. purchased from the ticket agent of the International & Great Northern Railway Company, a thru round trip ticket over said line and the other two deft. lines, from San Antonio, Texas to Owensboro, Kentucky, and return. That on Aug. 10, 1912, while returning on the Texas & Pacific Railway Company's line, he was commanded to alight in a heavy rain, and that the deft negligently failed to provide a safe place for him to alight. That there was a thru coach on said train to San Antonio, Texas, but deft. failed to tell this plff. of the fact, but commanded him to alight in said rain. That plff. had to ride on to San Antonio in said wet clothes and by reason of said negligence plaintiff contracted a severe illness. That plff. is now a helpless invalid, to his damage $30,000.00. That prior to said injuries plff. was earning $200 per month, but now is a helpless invalid and capable of earning nothing.

Wherefore plaintiff prays for judgment for his damages; costs and for general and special relief. That the defendants are connecting common carriers of passengers for hire. and you will deliver to the Defendant Texas & Pacific Railway Company, a corporation, by serving upon the Ticket-agent of the International & Great Northern Railway Company, a true copy of this writ.

HEREIN FAIL NOT, but have you before said Court on the first day of the next term thereof, this writ with your return thereon, showing how you have executed the same.

WITNESS, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas.

Given under my hand and Seal of said Courts, at office in the city of San Antonio, this the 16th day of Jany., A. D. 1913.

(Seal) ANDRES COY, JR.,

(Issued same day) Clerk of the District Courts of Bexar County, Texas. By Garvin C. Legan, Deputy.

RETURN OF OFFICER.

Came to hand 16 day of January, A. D. 1913, at 10 o'clock a. m., and executed 16 day of January, A. D. 1913, in San Antonio, Texas, at 6 o'clock p. m., by delivering to defendant Texas and Pacific Railway Company, a corporation, through its agent G. M. Bynum who is local ticket agent in San Antonio, Bexar County, Texas, in person a true copy of this citation.

I traveled 5 miles in the execution of this writ.

JNO. W. TOBIN,

Sheriff of Bexar County, Texas. By A. Newton, Jr.

Fees: Serving 1 writ, $ .75; mileage 5, $ .25; total, $1.00.

ENDORSEMENTS.

57th Judicial District

No. B—4936

J. T. Bigger
versus
I. & G. N. Ry. Co. et al

Citation

Filed Jan. 17, A. D. 1913. Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas. By M. J. Steuart, Deputy.

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NOTICE OF REMOVAL.

J. T. Bigger
vs. No. B—4936
The Texas & Pacific Ry. Co.

In District Court 57th Judicial District Bexar County, Texas.

To Plaintiff or Ernest Felbaum, or Claud J. Carter, Attorney of Record:

This is to notify you that the defendant in the above numbered and entitled cause will, hereafter, within the time allowed by law, file, in the above Court, petition and bond for the removal of said cause to the District Court of the United States for the Western District of Texas.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant.

The original notice, of which the above is a copy, was served by me upon Ernest & Felbaum by delivering such original notice to said Ernest Felbaum in person at 4:30 p. m., on the 20 day of January A. D. 1912.

T. D. COBBS, JR.

Subscribed and sworn to before me, this....day of.... A. D. 19....

.....

Notary Public in and for.....County, Texas.

Service of above notice is this day accepted, and all further notice and service of the filing of said petition and bond for removal are waived.

This 20th day of January, A. D. 1913.

CLAUDE J. CARTER,
ERNEST FELBAUM,
Attorneys for Plaintiff.

Filed Feb. 7, 1913.

Andres Coy, Jr., District Clerk, Bexar County. By A. B. Kliefoth, Deputy.

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J. T. Bigger
vs. No. B—4936
I. & G. N. Ry. Co. et al

District Court, 57th Judicial District in and for Bexar County.

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## BILL OF COSTS

Sheriff's Fees: Executing writs, $4.50; executing citations, $4.50; jury fee, $ .50; mileage, $ .40; total sheriff's fees, $9.90.

Clerk's Fees: Docketing, $ .20; citation, copies and returns, $8.75; copies of petitions, $2.50; approving bonds, $1.50; filing papers, $ .75; entering orders, $ .75; precepts to serve copies, $4.50; commissions to take depositions, $ .75; copies of interrogatories, $15.00; taxing costs, $ .25; transcript, $18.50. Total clerk's fees, $53.45.

Recapitulation: Clerk's fees, $53.45; Sheriff's fees, $9.90; Sheriff Dallas Co. serving cit., $1.00. Total amount due, $64.35.

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CERTIFICATE

THE STATE OF TEXAS,
County of Bexar.

I, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas, do hereby certify that the foregoing Thirty-two (32) pages contain a true and correct transcript of all the orders and proceedings had in a cause on the Civil Docket of the District Court of the 57th Judicial District of Bexar County, Texas, numbered No. B—4936 wherein J. T. Bigger is Plaintiff and The Texas & Pacific Ry. Co., et al are Defendants.

Witness my hand and seal of said court, at office in the city of San Antonio, this the 17th day of February, A. D. 1913.

(Seal) ANDRES COY, JR.,

District Clerk, Bexar County, Texas. By A. B. Kliefoth, Deputy.

Applied for by W. L. Hall, Cobbs, Eskridge & Cobbs, Guinn & McNeil & R. G. Cater, Attorneys of Record for Defendants, on the 3rd day of February, 1913, and delivered to Cobbs, Eskridge & Cobbs, on the 18th day of February, 1913.

ANDRES COY, JR.,
Clerk, District Courts, Bexar County, Texas. By A. B. Kliefoth, Deputy.

Filed Feb. 24, 1913.

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## ORIGINAL ANSWER OF DEFENDANT.

No. 192 *D. C. Law*
Bigger
vs.
T. & P. et al.

In the United States District Court, for the Western District of Texas.

*Now Comes this Defendant Herein*: The Texas & Pacific Railway Co., and the International & Great Northern Railway Co., and enters this, his General Demurrer, to the Plaintiffs Petition, in the above styled and numbered cause, and says that the same is insufficient in law and does not state a cause of action against this Defendant.

And for this, he prays judgment of the Court:

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant,
THE TEXAS & PACIFIC RY. CO.,
THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

*Now Comes this Defendant Herein*: The Texas & Pacific Railway Co., and the International & Great Northern Railway Co.,

And says should his General Demurrer, filed herein, be overruled, and he be required to answer further;

Then this Defendant denies all and singular the allegations of the Plaintiffs Petition, and of this he puts himself upon the country.

Wherefore Defendant prays the judgment of this Court that he be discharged and go hence with his costs, and so forth.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant,
THE TEXAS & PACIFIC RY. CO., and
THE INTERNATIONAL & GREAT
NORTHERN RAILWAY CO.

Filed March 1, 1913.

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## PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger,
vs. No. 192 *At Law*
International & Great Northern Railway Company, Texas and Pacific Railway Company and St. Louis Iron Mountain & Southern Railway Company.

To the Honorable T. S. Maxey, Judge of said Court:

*Now Come* Ludie Bigger, Charles H. Bigger, 22; James M. Bigger, 16; Ruth H. Bigger, 11; Lucy F. Bigger, 8; Virginia G. Bigger, 6; and Robert L. Bigger, 2; and suggest the death, since the institution of this suit, of the original plaintiff, J. T. Bigger, and with leave of the court first had, make themselves parties plaintiff hereto, and amend the original petition filed herein on the 5th day of December, A. D. 1912, and for such amendment said plaintiffs complain of the International & Great Northern Railway Company, Texas & Pacific Railway Company, and St. Louis, Iron Mountain & Southern Railway Company, hereinafter styled defendants, and respectfully represent to this Honorable Court:

That the original petitioner, J. T. Bigger, was a resident citizen of Bexar County, Texas, at the date he received the injuries hereinafter alleged and at the time the original suit was instituted, and at the time of his death; that the plaintiff, Ludie Bigger, is now and was on the dates hereinafter mentioned, a resident of Bexar County, Texas, and was the wife of the said J. T. Bigger; that the Plaintiffs, Charles H. Bigger, James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger and Robert L. Bigger, are the only surviving children of the said J. T. Bigger; that the plaintiffs, James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger and Robert L. Bigger, are minors, and sue herein by their mother, Ludie Bigger, as next friend, and that all of said plaintiffs are now and were on the dates hereinafter mentioned residents of Bexar County, Texas.

That the defendant, International & Great Northern Railway Company, is a railroad corporation, duly incorporated under the laws of the State of

Texas, and is now and was at the time J. T. Bigger was injured, operating a line of railway running from Longview, Texas, to San Antonio, Texas, and elsewhere in the State of Texas, and has an agent in Bexar County, Texas, upon whom service of citation may be had; that the defendant, Texas & Pacific Railway Company, is a railroad corporation, duly incorporated, and operates a line of railway from Texarkana, Texas, to Longview, Texas, and to other points in the State of Texas, and it has an agent in Dallas County, Texas, upon whom service of citation may be had in this cause; that the defendant, St. Louis, Iron Mountain & Southern Railway Company, is a foreign corporation, duly incorporated, and operates a line of railway through the States from Texarkana, Arkansas, to the city of St. Louis, in the State of Missouri; that said defendant has an agent in Bexar County, Texas, upon whom service may be had; that all of said defendants are common carriers of passengers for hire, and said defendants operate a continuous line of railway from the city of San Antonio, Texas, to the city of St. Louis, Missouri; that the said defendants, so plaintiffs are informed and believe, upon the date hereinafter mentioned, had a partnership agreement, under which said agreement the agent of the defendant, International & Great Northern Railway Company, who sold the passenger ticket to J. T. Bigger, as hereinafter alleged, was acting as the agent of all of the defendants, and that each and all of said defendants were doing business in the State of Texas through some one or all of the others constituting said partnership; that the agent of the International & Great Northern Railway Company, who sold the passenger ticket hereinafter mentioned to the said

J. T. Bigger, was also the agent and acted for the benefit of the defendants, Texas & Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company, and service upon each defendant may be had by serving the agent of the defendant, International & Great Northern Railway Company, who sold the ticket to J. T. Bigger, as hereinafter set out.

Plaintiffs aver that heretofore, to-wit: on or about the 20th day of June, 1912, the said J. T. Bigger being desirous of being transported to the city of Owensboro, Kentucky, from the city of San Antonio, Texas, and return, purchased a ticket from the defendant, International & Great Northern Railway Company, the same being a through round trip ticket over the lines of railway of the defendants, and in the sale of said ticket to J. T. Bigger, the said International & Great Northern Railway Company acted for itself, and as the agent of all the aforesaid defendants, and in pursuance of the partnership agreement existing between all of the defendants, the said International & Great Northern Railway Company, acted for and represented all of the defendant corporations constituting said partnership in the sale of tickets, and that all of the defendants acquiesced in and accepted the benefits of said sale of said ticket, and honored the same as a valid and proper ticket, by permitting the said J. T. Bigger to ride on its trains as a passenger; that by reason of the price paid for said ticket, it became the defendants' duty to safely transport J. T. Bigger from the city of San Antonio, Texas, to St. Louis, Missouri, and return.

Plaintiffs aver that on or about the 10th day of August, A. D. 1912, the said J. T. Bigger was re-

turning from Owensboro, Kentucky, to San Antonio, Texas, on the said ticket, which said return journey was provided for in said ticket, and that by virtue of said ticket, the said J. T. Bigger was a passenger on the line of railway of the defendant, Texas & Pacific Railway Company; that while said J. T. Bigger was a passenger on said defendant's train, said train came to a stop at or near the station of Longview, Texas; that at said time it was raining and had been raining for some time prior thereto and the ground was covered with a solid sheet of water; that after said train came to a stop, the said defendant's employes, in charge of the train, negligently ordered and commanded the said J. T. Bigger to leave the said train in said rain and water and J. T. Bigger was compelled to so leave said train and thus be exposed to said rain and water, whereby he was thoroughly drenched, and by reason of said exposure and drenching the said J. T. Bigger became violently ill and suffered severely.

Plaintiffs aver that the train of the Texas & Pacific Railway Company, upon which the said J. T. Bigger was a passenger from Texarkana, Texas, until it reached the point near Longview, Texas, where it stopped, had a passenger coach attached, which continued beyond Longview, Texas, over the line of railway of the defendant, International & Great Northern Railway Company, and as far as San Antonio, Texas; that said defendant, Texas & Pacific Railway Company, its servants and employes, knew that said J. T. Bigger's destination point was San Antonio, Texas, yet, notwithstanding such knowledge, they negligently failed to inform or notify said J. T. Bigger that this through passenger coach was in said train upon which he was riding,

and negligently failed to give him an opportunity to safely enter said car while the same was attached to the train upon which he was a passenger before he was ordered to leave said train at or near Longview, Texas, by passing through the other cars in said train to said through car; that said defendant was further guilty of negligence in ordering, commanding and compelling J. T. Bigger to leave said passenger train of the Texas & Pacific Railway Company in said down pouring rain and water covered ground and in not providing a reasonably safe and protected place for him to alight; that the aforesaid acts of the defendants in so negligently exposing said J. T. Bigger to said rain and water directly and solely caused him the injuries, sickness and suffering, hereinafter set out, without any fault whatever on his part.

Plaintiffs aver that by reason of the said J. T. Bigger being so negligently exposed to said rain and water, his clothes became thoroughly wet, and he was compelled to ride on to San Antonio, Texas, with his clothes in this condition; that by reason of said exposure he contracted a severe cold and high fever, and became violently ill, and caused him to suffer pleurisy with effusion; that said exposure seriously affected his lungs and head, and seriously lowered his general vitality; that by reason of said condition so negligently brought about by defendants, the said J. T. Bigger's general health was so greatly impaired as to render him a perfect physical wreck and (he is now a hopeless) invalid and his death was caused thereby on Feb. 28, 1913; that by reason of said injuries and illness the said J. T. Bigger has been constantly confined to his home and bed; that his nervous system has been wrecked and he is unable by rea-

son of this condition to obtain restful sleep by day or night, and by reason of said injuries and illness he has suffered great and excrutiating mental and physical pain, and for the balance of his life he will suffer such pain.

Plaintiffs aver that prior to the injuries, the said J. T. Bigger was a strong and industrious man, able to perform physical labor, and was earning and was capable of earning the sum of about $200.00 per month, which earning capacity he had a reasonable expectancy of increasing in the future, but by reason of said injuries and sickness, so negligently caused by the defendants, he has been wholly unable to perform labor of any kind or to earn money, and his capacity to labor and earn money in the future has been permanently destroyed, and by reason of the premises, the said J. T. Bigger has been damaged in the sum of Thirty Thousand Dollars.

Plaintiffs further aver that since the institution of this suit and on February 28th, 1913, the said J. T. Bigger died in the city of San Antonio, Texas, and plaintiffs are advised and believe and so charge the fact to be that the said J. T. Bigger died as a result of his aforesaid injuries.

Plaintiffs further aver that the said J. T. Bigger was a kind, loving and devoted husband and father and gave much time and attention to the assistance of his wife and to the rearing and mental and moral training of his children; that his said wife and minor children were entirely dependent upon him for support and that he contributed substantially all of his wages to the support of his family; that the said J. T. Bigger left no father or mother or other person entitled to sue for his death, except his

wife and children named herein as plaintiffs; and these plaintiffs aver that by reason (of the wrongful and negligent death of the said J. T. Bigger, plaintiffs have been damaged, and that the wife, Ludie Bigger, has sustained damages in the sum of Fifteen Thousand Dollars, and that the said children, Lucy F. Bigger, Ruth H. Bigger, Virginia G. Bigger, Robert L. Bigger, and James M. Bigger have been damaged in the sum of Five Thousand Dollars each, and that his adult son, Charles H. Bigger, has been damaged in the sum of Two Thousand Dollars, for which sums, together with costs of court and general relief, these plaintiffs pray.)

Plaintiffs further allege that the said J. T. Bigger died as a result of his injuries, but if it should be determined upon the trial of this cause that the said J. T. Bigger died from some cause independent of or other than his injuries, then and in that event, the plaintiffs say that they are the wife and children of the said J. T. Bigger and were such wife and children at the time of and before he received said injuries, and that he left no other children or their descendants; that the plaintiff, Ludie Bigger is the legal representative of said J. T. Bigger, having heretofore, to-wit: on the 24th day of March, A. D. 1913, been duly appointed temporary Administratrix by the County Court of Bexar County, Texas; with full power and authority to presecute this suit to final termination; that plaintiffs are the sole heirs of the said J. T. Bigger, and the said Ludie Bigger is the sole legal representative, and plaintiffs pray that they, as the sole heirs and legal representatives of the said J. T. Bigger, be permitted to prosecute this suit as plaintiffs, and that the cause of action as it existed

in the said J. T. Bigger survive to them and that upon a trial hereof they have a judgment for such sum as the said J. T. Bigger would have been entitled to had he lived, together with costs of court and for such general and special relief as they may be entitled to in law and in equity.

ERNEST FELLBAUM,
C. J. CARTER,
Attorneys for Plaintiffs.

Filed March 31, 1913.

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## ORIGINAL ANSWER OF DEFENDANT.

J. T. Bigger
vs. No. 192—*Law.*
I. & G. N. Ry. Co. et al

In the District Court of the United States, at San Antonio, Texas.

*Now Comes* the defendant, St. Louis, Iron Mountain & Southern Railway Company, and demurring to plaintiff's petition says the same is insufficient in law and shows no cause of action in plaintiff against this defendant of which demurrer it prays the judgment of the court.

And if held for further answer the defendant denies all and singular, the allegations in the said petition and demands strict proof thereof.

GUINN, McNEIL & R. G. CATER,
Attorneys for Defendant, St. L. I. M. & S. Ry. Co.

Endorsed: No. 192.
J. T. Bigger, vs. I. & G. N. Ry. Co. et al.
Original Answer of Defendant, St. Louis, Iron Mountain & Southern Railway Co.
Filed May 1st, 1913. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

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## ORDER GRANTING BOTH PARTIES LEAVE TO AMEND AND CAUSE SET MAY 15, 1913.

J. T. Bigger
vs. No. 192—*Law.*
International & Great Northern Ry. Co., Texas & Pacific Ry. Co., and St. Louis Iron Mountain & Southern Ry. Co.

Monday, May 5, 1913.

In this cause both parties have leave to amend and cause set for May 15th, 1913.

Filed May 5th, 1913.

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## FIRST AMENDED ORIGINAL ANSWER OF DEFENDANT.

In the District Court of the United States, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No.——*Law.*
I. & G. N. Ry. Co. et al

The defendant, St. Louis, Iron Mountain & Southern Railway Company, demurs generally to plaintiff's second Amended Original Petition in this cause and says that same is insufficient in law and shows no cause of action in the plaintiff against this defendant, of which demurrer this defendant prays the judgment of the court.

GUINN, McNEIL & R. G. CATER,
Attorneys for Defendant, St. L., I. M. & S. Ry Co.

This defendant specially demurs to those allegations of plaintiff's petition attempting to show a partnership agreement existing between this defendant and its co-defendants, the International & Great Northern Railway Company and the Texas & Pacific Railway Company, and says that said allegations are insufficient in that they do not set out any facts showing any partnership agreement or the terms and conditions thereof which would constitute any partnership or by reason of which this defendant could be held liable for any injuries caused by its co-defendants, and not occurring on the line of this defendant.

This defendant further specially demurs to plaintiff's said petition because same shows on its face that the injuries complained of, if they exist at all, were caused by the acts of its co-defendants, with which this defendant had nothing to do.

This defendant further specially demurs to plaintiff's said petition because it does not appear therefrom that the injuries complained of by the plaintiff were caused by any act or conduct of this defendant or by the act or conduct of any of its employees or representatives, or that of any person or corporation for whose acts this defendant would be

liable, of all which special exceptions this defendant prays the judgment of the court and prays that, in so far as this defendant is concerned, this cause be dismissed.

GUINN, McNEIL & R. G. CATER,
Attorneys for Defendant, St. L., I. M. & S. Ry. Co.

And in the event said general and special demurrers should be overruled by the court and this defendant is held to further answer herein, it denies all and singular the allegations of said petition and demands proof thereof.

Further answering this defendant says that if the plaintiff traveled over its line or railway as alleged, that he was safely handled while in this defendant's charge and was transported with care, diligence and speed without injury, and that, if this defendant was under any obligations to the plaintiff by reason of the facts alleged by plaintiff, that it, in every way, complied with any contract or agreement made with the plaintiff and in every way complied with its obligations to the plaintiff.

This defendant further says that if plaintiff was injured as alleged that such injuries occurred on the line of its co-defendant or co-defendants and after this defendant had carried out all of its obligations, if any, to the plaintiff and after it had delivered the plaintiff safely into the care and custody of its co-defendant, the Texas & Pacific Railway Company, and that this defendant is in no way liable for any injuries that may have been suffered by the plaintiff after he had passed out of its charge.

This defendant further denies all the allegations of plaintiff's petition attempting to show the existence of a partnership agreement between this de-

fendant and its co-defendants, or that the agent of defendant, International & Great Northern Railway Company, sold the plaintiff his ticket by virtue of which he was being transported, at the time of his alleged injury, was acting under any such partnership agreement or that he was acting as the agent of all the defendants.

This defendant further says that no kind of partnership or partnership agreement existed on July 10, 1912, or about that date, or before or since said date, between this defendant and its co-defendants, the Texas & Pacific Railway Company and the International & Great Northern Railway Company, or either of them.

Wherefore, this defendant prays that the plaintiff take nothing against it in this suit and that it recover all costs of court by it in this behalf expended.

GUINN, McNEIL & R. G. CATER,
Attorneys for Defendant, St. L., I. M. & S. Ry. Co.

In the District Court of the United States, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. ——*Law*
I. & G. N. Ry. Co. et al

Before me, the undersigned authority on this day personally appeared A. G. McNeil, attorney for the defendant, St. Louis, Iron Mountain & Southern Railway Company who being by me duly sworn deposes and says that heretofore, to-wit: on the 10th day of July, 1912 or at any time before or since that date, during the year 1912, the defendant, St. Louis, Iron Mountain & Southern Railway Company was

not a partner of the defendants, the Texas & Pacific Railway Company and the International & Great Northern Railway Company or either of them.

A. G. McNEILL.

Subscribed and sworn to before me this 14th day of May, A. D. 1913

WADE H. BLISS,
(Seal) Notary Public, Bexar County, Texas.

Filed May 16th, 1913.

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FIRST AMENDED ORIGINAL ANSWER OF DEFENDANT.

In the District Court of the United States, Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192—*At Law*.
International & Great Northern Railway Company, Texas & Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company.

*Now Comes* the Texas & Pacific Railway Company, one of the Defendants in the above styled and numbered cause, and demurs generally to Plaintiff's Second Amended Original Petition, filed herein and says that same is insufficient in law to state a cause of action against this Defendant and of this prays judgment of the court.

Further answering herein, if same be required, this Defendant denies all and singular, the allega-

tions contained in Plaintiff's Second Amended Original Petition, and of this puts itself upon the Country.

By way of special answer herein, if same be required, this Defendant says that it is not liable for the injuries complained of in Plaintiff's said Petition, for the following reasons, to-wit; that this Defendant, as its train upon which it is alleged that J. T. Bigger was a passenger, approached the City of Longview, Texas, caused to be announced in the chair car in which the said Bigger was a passenger, that all passengers therein, destined for points on the I & G N should pass out of said car and into the through coach in said train for I & G N points. That an employe of this Defendant made such announcement and passed through the chair car in which this Plaintiff was a passenger for the purpose of having all such passengers change coaches before the train reached Longview, and for the purpose of assisting all such passengers to transfer from said chair car to the through coach destined to I & G N points. That though said announcement was made, the said J. T. Bigger made no effort to leave said car and transfer to the through coach and failed to notify this Defendant, through its said employe, that he desired to make such transfer. That in making such announcement this Defendant performed all and every duty imposed upon it by law to the said J. T. Bigger, and that if the said J. T. Bigger suffered any of the injuries as alleged in Plaintiff's Second Amended Original Petition, that same were the result of, and proximately caused by, his own negligence and want of ordinary care for his own safety in not heeding said announcement and acting thereon.

This Defendant further says that if the said J. T. Bigger had heeded the announcement made by this Defendant as aforesaid, and had availed himself of the opportunity of making the transfer as did other passengers, or had indicated to any of this Defendant's employes that he desired to make such transfer, or was destined to any I & G N point, then that the said Bigger could and would have been transferred from the T & P coach in which he was a passenger, to the coach for I & G N points, and could and would have avoided being subjected to the elements and resulting injuries, if any, therefrom.

Defendant further says that upon arrival at the town of Longview, that it stopped its train and coach, in which the said J. T. Bigger was a passenger, at the usual and ordinary place for stopping said trains, and that a station building and shelter from rain was in close proximity to the point where said train was stopped; that there were a number of passengers who alighted from the said coach in which Bigger was a passenger and proceeded therefrom to the said station building and that there was no obstruction or any other reason why the said Bigger could not have promtly and immediately gone to said station building and shelter, and that if he did not do so, and was exposed to the rain for any length of time, that then said exposure was a result of his own negligence and want of ordinary care for his own safety in standing in said rain and refusing or declining to immediately go to the place of shelter provided for passengers.

This Defendant further says that the alleged poor condition of the health of said J. T. Bigger at the time of the institution of this suit, and his subsequent death were not caused by, and were not the result of,

any acts of negligence whatever upon the part of this Defendant, but that the said Bigger was on the 10th day of August, and prior thereto, in an extremely poor state of health and for a long time had been the unfortunate victim of tubercular infection which said dreadful disease had progressed to such a point as that it had made great ravages upon his vitality, and reduced him to the point that he had been forced to abandon his work and was then returning to San Antonio with hope practically abandoned; That he had surrendered his position at Owensboro, Ky.. with the definite and final understanding that his only hope for prolonging his life, even a short time, was to leave the climate in which he was residing and working and return to San Antonio. That the death of said J. T. Bigger was the direct and proximate result of his said infection and of the progressive disease aforesaid, and was not directly and proximately caused by this Defendant, as alleged in Plaintiff's Second Amended Original Petition.

Premises considered, this Defendant prays that it go hence without day and with its costs herein incurred.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant, Texas & Pacific Railway Company.

Filed May 16, 1913.

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## PLAINTIFFS SECOND AMENDED ORIGINAL PETITION.

In the District Court of the United States, Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192—*At Law.*
International & Great Northern Railway Company, Texas & Pacific Railway Company and St. Louis Iron Mountain & Southern Railway Company.

To the Honorable T. S. Maxey, Judge of said Court:

*Now Come* Ludie Bigger, Charles H. Bigger, James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger, and Robert L. Bigger, and with leave of the court first had, file this their second amended original petition in lieu of their first amended original petition filed herein on March 31, 1913, and still complain of the defendants, International & Great Northern Railway Company, Texas & Pacific Railway Company, and St. Louis, Iron Mountain & Southern Railway Company, and respectfully represent to this Honorable Court:

That the original petitioner, J. T. Bigger, died on the 28th, day of February 1913, from the injuries he received by reason of the negligence of the defendants, as hereinafter alleged, and the said J. T. Bigger, was at the time he received the injuries which caused his death, and at the time the original suit was instituted, and at the time of his death a resident citizen of Bexar County, Texas; that the plaintiff, Ludie Bigger, is now and was on the dates hereinafter mentioned, a resident of Bexar County, Texas, and was the wife of the said J. T. Bigger; that the plaintiffs, Chas. H. Bigger, James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger and Robert L. Bigger, are the only surviving children of the said J. T. Bigger; that the plaintiffs,

James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger, and Robert L. Bigger are minors and sue herein by their mother Ludie Bigger as next friend and that all of said plaintiffs are now and were on the dates hereinafter mentioned residents of Bexar County, Texas.

That the defendant, International & Great Northern Railway Company, is a railroad corporation, duly incorporated under the laws of the State of Texas, and is now and was at the time J. T. Bigger was injured, operating a line of railway running from Longview, Texas, to San Antonio, Texas, and elsewhere in the State of Texas, and has an agent in Bexar County, Texas, upon whom service of citation may be had; that the defendant, Texas & Pacific Railway Company, is a railroad corporation, duly incorporated, and operates a line of railway from Texarkana, Texas, to Longview, Texas, and to other points in the State of Texas, and it has an agent in Dallas County, Texas, upon whom service of citation may be had in this cause; that the defendant, St. Louis, Iron Mountain & Southern Railway Company, is a foreign corporation, duly incorporated, and operates a line of railway through the States from Texarkana, Arkansas to the City of St. Louis, in the State of Missouri; that said defendant has an agent in Bexar County, Texas, upon whom service may be had; that all of said defendants are common carriers of passengers for hire, and said defendants operate a continuous line of railway from the City of San Antonio, Texas, to the City of St. Louis, Missouri; that the said defendants, so plaintiffs are informed and believe, upon the date hereinafter mentioned, had a partnership agreement, under which said agreement the agent of the defendant, Interna-

tional & Great Northern Railway Company, who sold the passenger ticket to J. T. Bigger, as hereinafter alleged, was acting as the agent of all of the defendants, and that each and all of said defendants were doing business in the State of Texas through some one or all of the others constituting said partnership; that the agent of the International & Great Northern Railway Company, who sold the passenger ticket hereinafter mentioned to the said J. T. Bigger, was also the agent and acted for the benefit of the defendants, Texas & Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company, and service upon each defendant may be had by serving the agent of the defendant, International & Great Northern Railway Company, who sold the ticket to J. T. Bigger, as hereinafter set out.

Plaintiffs aver that heretofore, to-wit: On or about the 20th day of June 1912, the said J. T. Bigger being desirous of being stransported to the city of Owensboro, Kentucky, from the City of San Antonio, Texas, and return, purchased a ticket from the defendant, International & Great Northern Railway Company, the same being a through round trip ticket over the lines of railway of the defendants, and in the sale of said ticket to J. T. Bigger, the said International & Great Northern Railway Company acted for itself and as the agent of all the aforesaid defendants, and in pursuance of the partnership agreement existing between all of the defendants, the said International & Great Northern Railway Company acted for and represented all of the defendant corporations constituting said partnership in the sale of tickets, and that all of the defendants acquiesced in and accepted the benefits of said sale of said ticket,

and honored the same as a valid and proper ticket, by permitting the said J. T. Bigger to ride on its trains as a passenger; that by reason of the price paid for said ticket, it became the defendants' duty to safely transport J. T. Bigger from the City of San Antonio, Texas, to St. Louis, Missouri, and return.

Plaintiffs aver that on or about the 10th day of August, A. D. 1912, the said J. T. Bigger was returning from Owensboro, Kentucky, to San Antonio, Texas, on the said ticket, which said return journey was provided for in said ticket, and that by virtue of said ticket, the said J. T. Bigger was a passenger on the line of railway of the defendant, Texas & Pacific Railway Company; that while said J. T. Bigger was a passenger on said defendant's train, said train came to stop at or near the station of Longview, Texas; that at said time it was raining and had been raining for sometime prior thereto and the ground was covered with a solid sheet of water; that after said train came to a stop, the said defendant's employes, in charge of the train, negligently ordered and commanded the said J. T. Bigger to leave the said train in said rain and water, and thus be exposed to said rain and water, whereby he was thoroughly drenched, and by reason of said exposure and drenching the said J. T. Bigger became so violently ill and suffered so severely as to cause his death on February 28th 1913.

Plaintiffs aver that the defendants were guilty of several distinct acts of negligence, each of which separately and distinctly caused and contributed to produce the illness and death of the said J. T. Bigger:

First. That the train of the Texas and Pacific Railway Company, upon which the said J. T. Bigger

was a passenger from Texarkana, Texas, until it reached the point near Longview, Texas, where it stopped, had a passenger coach attached, which continued beyond Longview, Texas, over the line of railway of the defendant, International & Great Northern Railway Company, and as far as San Antonio, Texas; that said defendant, Texas & Pacific Railway Company, its servants and employes, knew that said J. T. Bigger's destination point was San Antonio, Texas, yet, notwithstanding such knowledge, they negligently failed to inform or notify said J. T. Bigger that this through passenger coach was in said train upon which he was riding, and negligently failed to give him an opportunity to safely enter said car while the same was attached to the train upon which he was a passenger before he was ordered to leave said train at or near Longview, Texas, by passing through the other cars in said train to said through cars, and thus would have avoided the exposure of the said J. T. Bigger to said rain and water, and the defendant's negligence in this respect directly caused and contributed to the illness and death of the said J. T. Bigger.

Second. That when said train came to a stop at or near the station of Longview, Texas, it was raining and the ground was covered with water, and the said defendant, Texas & Pacific Railway Company, its servants and employes negligently ordered and commanded the said J. T. Bigger to leave the said train in said rain and water, and by reason of such negligence he was compelled to so leave said train and thus be exposed to said rain and water, and said defendant was guilty of negligence in thus exposing him to said rain and water and in not providing a reasonably safe and protected place for him to alight,

and therefore, plaintiffs allege that the defendants negligence in this respect directly caused and contributed to the illness and death of the said J. T. Bigger.

Plaintiffs aver that each of the aforesaid acts of negligence are independent, separate and distinct acts of negligence, each and all of which contributed to the illness and death of the said J. T. Bigger; that the said J. T. Bigger was in the exercise of due and proper care to protect himself, and his death was directly caused, without fault on his part, by reason of the defendants aforesaid separate acts of negligence.

Plaintiffs aver that prior to his illness and death, so negligently caused by defendants' negligence, the said J. T. Bigger was a hardworking and industrious man, able to perform physical labor, and was earning and capable of earning the sum of about $200.00 per month, which earning capacity he had a reasonable expectancy of increasing in the future, and his said wife and children were wholly dependent on him for support and sustenance, and that the earnings of the said J. T. Bigger were largely expended for the care and maintenance of said wife and children; that the said J. T. Bigger was a kind, loving and devoted husband and father and gave much time and attention to the assistance of his wife and to the rearing and mental and moral training of his children.

Plaintiffs aver that by reason of the wrongful and negligent death of the said J. T. Bigger, plaintiffs have been damaged, and that the wife, Ludie Bigger, has sustained damages in the sum of Fifteen Thousand Dollars, and that the said children, Lucy F. Bigger, Ruth H. Bigger, Virginia G. Bigger, Robert L. Bigger, and James M. Bigger have been damaged in the sum of Five Thousand Dollars each, and that his

adult son, Charles H. Bigger, has been damaged in the sum of Two Thousand Dollars, for which sums, together with costs of court and general relief, these plaintiffs pray.

Plaintiffs further allege that they are informed and believe that defendants will plead that the said J. T. Bigger died from some cause independent of or other than his injuries, and if it should be so determined upon the trial of this cause, then and in that event, the plaintiffs say, that they are the wife and children of the said J. T. Bigger and were such wife and children at the time of and before he received said injuries, and that he left no other children or their descendants; that the plaintiff, Ludie Bigger is the legal representative of said J. T. Bigger, having heretofore, to-wit: On the 24th day of March A. D. 1913, been duly appointed temporary Administratrix by the County Court of Bexar County, Texas, with full power and authority to prosecute this suit to final determination. And the said plaintiffs as the, sole heirs of the said J. T. Bigger, and the said Ludie Bigger, as the sole legal representative, respectfully represent to the court that by reason of the separate and distinct acts of negligence of defendant heretofore set out, the said J. T. Bigger was exposed to said rain and water, and his clothes became thoroughly wet, and he was compelled to ride to San Antonio, Texas, with his clothes in this condition; that by reason of said exposure he contracted a severe cold and high fever, and became violently ill, and caused him to suffer pleurisy with effusion; that said exposure seriously affected his lungs and head, and seriously lowered his general vitality; that by reason of said condition so negligently brought about by defendants, the said J. T. Bigger's general health was so greatly

impaired as to render him a perfect physical wreck, and invalid. That by reason of said injuries and illness the said J. T. Bigger was constantly confined to his home and bed until he died; That he lost much time from his labor; that his nervous system was wrecked and by reason of said injuries and illness he suffered great and excrutiating mental and physical pain until his death. And plaintiffs say that by reason of the premises, they as sole heirs and legal representative, have been damagd in the sum of Fifteen Thousand Dollars.

Plaintiffs aver that they cannot more specifically allege the acts of negligence than they have done in this petition; that they cannot more specifically allege the injuries inflicted on said J. T. Bigger, and the suffering caused thereby, than they have done in this petition.

Plaintiffs pray, that if it should be determined that the said J. T. Bigger died from some cause other than his injuries, that they, as the sole heirs and legal representatives of the said J. T. Bigger, be permitted to proscute this suit as plaintiffs, and that the cause of action as it existed in the said J. T. Bigger survive to them and that upon a trial hereof they have judgment for said sum of Fifteen Thousand Dollars, together with costs of court and for such general and special relief as they may be entitled to in law and in equity.

CLAUDE J. CARTER,
ERNEST FELLBAUM,
Attorneys for Plaintiffs.

Filed as of May 16, 1913, on this Nov. 21, 1913.

## ORDER OF CONTINUANCE AND CAUSE SET FOR FIRST MONDAY JANUARY 1914

In the District Court of the United States in and for the Western District of Texas, at San Antonio

J. T. Bigger.
vs. No. 192 *Law*
International & Great Northern Railway Company, Texas & Pacific Railway Company, and St. Louis Iron Mountain & Southern Railway Company.
May 16, 1913.

Upon the application of the defendants it is ordered by the court that this cause be and the same is hereby continued, and by agreement the cause is set for trial for the FIRST MONDAY OF JANUARY, A. D. 1913.

Entered May 16, 1913. Vol. "F", page 480.

Filed May 16, 1913.

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## ORDER GRANTING ALL PARTIES LEAVE TO AMEND.

J. T. Bigger,
vs. No. 192 *Law.*
International & Great Northern Railway Co., Texas & Pacific Railway Co., and St. Louis Iron Mountain & Southern Railway Company.

Monday, January 5, 1914.

In this cause all parties are granted leave to amend.

Filed January 5th, 1914.

## FIRST AMENDED ANSWER OF DEFENDANT, ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.

In the District Court of the United States for the Western District of Texas, San Antonio Division.

J. T. Bigger,
vs.
The Texas & Pacific Railway Co., et al.

*Now Comes the Defendant,* St. Louis Iron Mountain and Southern Railway Company and demurring to the plaintiffs petition says that same is insufficient in law and shows no cause of action in the plaintiffs against this defendant, of which demurrer it prays the judgment of the court.

This defendant further specially excepts and denies that portion of the plaintiffs pleadings alleging partnership and the existence of a partnership agreement between this defendant and the other defendants herein, and says that said allegations are insufficient to show partnership or to hold this defendant liable as partner for the acts or negligence of any of its co-defendants, of which special demurrer it prays the judgment of the Court.

GUINN & McNEIL,
Attys. for Deft. St. L., I. M. & So. Ry. Co.

If held to further answer this defendant denies all and singular the allegations of plaintiffs pleadings and demands proof thereof.

This defendant further denies under oath plaintiffs allegations of its agency for any of the other defend-

ants and the existence of any partnership as alleged by the plaintiff.

3rd. And for further answer this defendant says that while the said J. T. Bigger was in the care of this defendant he received careful treatment and was not injured in any manner and no allegation to the contrary is or can be made by the plaintiffs herein, and if he suffered any injury as alleged same occurred through no, fault or negligence of this defendant and after he had passed out of its charge and custody and that of its servants agents and employees.

4th. And for further answer herein this defendant adopts as part of its answer all of the pleadings and defenses contained in the answers filed herein and relied on by its co-defendants, except such portions thereof, if any, which conflict or are inconsistent with the foregoing answer of this defendant.

Wherefore this defendant prays that the plaintiffs take nothing as against it, and that this defendant be allowed to go hence without day and recover all costs by it in this behalf expended, and for such other rerelief general or special as it may be entitled.

GUINN & McNEIL,
Attorneys for St. L., I. M. & So. Ry. Co.

R. G. McNEIL.

Subscribed and sworn to before me, the undersigned authority, on this 5th day of January, A. D. 1914, by A. G. McNeil.

(Seal)

R. G. CATER,
Notary Public, Bexar County, Texas.

Filed January 5th, 1914.

## SECOND AMENDED ORIGINAL ANSWER OF DEFENDANT, TEXAS & PACIFIC RAILWAY COMPANY.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger,
vs. No. 192, *At Law.*
I. & G. N. Ry. Co., et al.

I.

*Now Comes the Texas & Pacific Railway Co.*, one of the defendants in the above styled and numbered cause, and demurrs to plaintiff's Petition and cause of action as filed herein, for this,, that it says the Petition shows on its face that said suit was improperly instituted against the Texas & Pacific Ry. Co. in the District Court of Bexar County, because it appears from the face of said Petition that said defendant is a Federal corporation incorporated under the laws and acts of Congress, having its domicile in Dallas, Texas, and no part of its road in Bexar County, Texas, and as to said defendant, said suit is improperly brought in said Bexar County, and therefore this Court or any Court in Bexar County is without jurisdiction to try said suit because said suit is one arising under and involving damages for personal injury; and of this, defendant prays judgment of the Court.

II.

Defendant further demurrs to plaintiff's Second Amended Petition filed herein and says that the same is insufficient in law to state a cause of action against

this defendant; and of this it prays judgment of the Court.

III.

Defendant excepts to all that portion of Plaintiff's Petition which seeks to allege the partnership existing between it and its co-defendants, for this, that there are no allegations or facts stated which show upon their face that the said defendants are or were partners, or that their duty to the said defendant was other than common carrier without any element of partnership existing between them, but if the plaintiff claims that in fact there was a partnership existing between them other than as common carriers to transport passengers, that said allegations are insufficient, vague and indefinite and defendant requests and moves the court to strike the same out; and of this prays judgment of the court.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant, Texas & Pacific Ry. Co.

IV.

Further answering herein, if same be required, this defendant denies all and singular each and every allegation contained in plaintiff's Second Amended Petition, and of this puts itself upon the country.

V.

By way of special answer herein if same be required, this defendant denies that it is in any respect liable for the supposed and alleged injuries complained of in Plaintiff's Petition; for this, that the said J. T. Bigger, Deceased, was a passenger on the Texas

& Pacific Ry. Co., who was on his way to San Antonio, Texas, with a through ticket entitling him to ride on defendant's train and likewise on the train of the International & Great Northern Railway Co. That while on said train, the said Bigger had ample opportunity to transfer from one coach to another and that the Texas & Pacific Ry. Co had in its train of cars a passenger coach destined for points on the International & Great Northern Ry., upon which International & Great Northern Ry. car the said deceased, if he had used ordinary care, would have gotten into said car either when he first entered said train or at some other time during the passage of said train of cars over the line of the St. Louis, Iron Mountain & Southern Ry. Co., which said railway transported the said International & Great Northern Ry. car and the Texas & Pacific chair car in which the said deceased rode from a point on its line, as alleged in said Petition, while he was on said line of cars before reaching Texarkana and at any time thereafter before reaching Longview.

VI.

That said Texas & Pacific Railway Company complied with its duty and safely transported the said deceased over its line to the town of Longview, or Longview Junction, as it was its duty to do and that when said train reached Longview, the said Railway Company had performed its duty with the said Bigger as a passenger and its relation so far as a passenger was concerned, terminated when the said Bigger reached Longview, or Longview Junction, as he was entitled to ride to said point on said Railway and no further.

VII.

Defendant further says that upon arrival at the town of Longview, that it stopped its train and coach, in which the said J. T. Bigger was a passenger, at the usual and ordinary place for stopping said trains, and that a station building and shelter from rain was in close proximity to the point where said train was stopped; that there were a number of passengers who alighted from the said coach in which Bigger was a passenger and proceeded therefrom to the said station building and that there was no obstruction or any other reason why the said Bigger could not have promptly and immediately gone to said station building and shelter, and that if he did not do so, and was exposed to the rain for any length of time, that then said exposure was a result of his own negligence and want of ordinary care for his own safety in standing in said rain and refusing or declining to immediately go to the place of shelter provided for passengers.

VIII.

This defendant further says that the alleged poor condition of the health of said J. T. Bigger at the time of the institution of this suit, and his subsequent death, were not caused by, and were not the result of, any acts of negligence whatever upon the part of this defendant, but that the said Bigger was on the 10th day of August, and prior thereto, in an extremely poor state of health and for a long time had been the unfortunate victim of tubercular infection which said dreadful disease had progressed to such a point as that it had made great ravages upon his vitality, and reduced him to the point that he had been forced to

abandon his work and was then returning to San Antionio with hope practically abandoned; That he had surrendered his position at Owensboro, Kentucky, with the definite and final understanding that his only hope for prolonging his life, even a short time, was to leave the climate in which he was residing and working and return to San Antonio. That the death of said J. T. Bigger was the direct and proximate result of his said infection and of the progressive disease aforesaid, and was not directly and proximately caused by this Defendant, as alleged in Plaintiff's Second Amended Original Petition.

Premises considered, this Defendant prays that it go hence without day and with its costs herein incurred.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant, Texas & Pacific Ry. Co.

Filed January 5th, 1914.

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## FIRST AMENDED ORIGINAL ANSWER OF DEFENDANT, I. & G. N. RY. CO.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger,
vs. No. 192 *At Law.*
International & Great Northern Railway Company, Texas & Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company.

*Now Comes the International & Great Northern*

*Railway Company* one of the Defendants in the above styled and numbered cause and, leave of the Court having been had and obtained, files this its First Amended Original Answer in lieu of its original answer filed herein on the....day of.....1913 and says;

I.

This Defendant is improperly joined in this suit with the Texas & Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company for the following reasons:

This suit is based upon injuries alleged to have been received by Plaintiffs' deceased by reason of alleged wrongful and negligent acts of the Texas & Pacific Railway Company at Longview, Texas, on or about the 10th day of August 1912, and is not based upon any alleged damage or loss caused by or growing out of the transportation contract set up in Plaintiffs' Petition.

That the ticket which was purchased by J. T. Bigger from the I & G N Railway Company on or about June 20th, 1912, contained a stipulation under the terms of which this defendant limited its liability to accidents occurring on its own line and that said stipulation and condition was accepted by the said J. T. Bigger in consideration of the reduced fare at which the said ticket was sold.

That the I & G N Railway Company was not, upon the date mentioned in Plaintiff's Petition, and is not at this time a party to any partnership agreement between this Defendant and the other Defendants herein, or either of them, but that said companies are each a separate corporation.

Wherefore, this Defendant prays that it be dis-

miss from said cause and go hence without day and with its costs herein incurred.

COBBS, ESKRIDGE & COBBS,
Attys. for Defendant, I & G N Ry. Co.

*Now comes J. M. Eskridge* one of the attorneys representing the International & Great Northern Railway Company, who upon oath says that the matters set out in the above plea are true as therein stated, as he verily believes.

J. M. ESKRIDGE.

Sworn to and subscribed before me this 3rd day of Jany., 1914.

(Seal) JESSIE G. BREWSTER,
Notary Public in and for Bexar County, Texas.

Not waiving the foregoing plea, but specially insisting upon same, and only in the event same be overruled, now comes the International & Great Northern Railway Company and demurs generally to the Plaintiff's Second Amended Original Petition herein, and says that same is insufficient in law to constitute and show a cause of action against this Defendant, and of this prays judgment of the Court.

COBBS, ESKRIDGE & COBBS,
Attys. for Defendant I & G N Ry. Co.

Not waiving the plea herein above set out, or the general demurer, but specially insisting upon said plea and demurrer and only in the event same are overruled, now comes this Defendant and denies all and singular the allegations contained in Plaintiff's Second Amended Original Petition and demands strict proof of same.

If required to answer further herein, then this De-

fendant adopts for its defense the matters set up and alleged in the answer of its Co-Defendant, the Texas & Pacific Railway Company.

By way of special answer herein, if same be required, this Defendant says that if the said J. T. Bigger was injured as alleged in Plaintiff's Second Amended Petition, which this Defendant does not admit, but denies, then that such injuries, if caused by anyone, other than the said J. T. Bigger himself, were caused by the T & P Railway Company and not by this Defendant.

COBBS, ESKRIDGE & COBBS,
Attys. for Defendant, I & G N Ry. Co.

Filed January 5th, 1914.

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## PLAINTIFFS' SUPPLEMENTAL PETITION

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger,
vs. No. 192 *At Law.*
International & Great Northern Railway Company, Texas & Pacific Railway Company, and St. Louis, Iron Mountain & Southern Railway Company.

To the Honorable T. S. Maxey, Judge:

*Now Come* plaintiffs in the above numbered and entitled cause and with leave of Court file this their First Supplemental Petition in reply to defendants' answer filed herein, January 5th, 1914, and respectfully represent to the Court:

1. Plaintiffs specially deny the allegation in paragraphs five, six and seven of said answer, wherein it alleges that J. T. Bigger was guilty of negligence that contributed to his injuries and his death, but they allege that the said J. T. Bigger was at the time of his injuries in the exercise of all due and proper care to prevent injuries to himself, and his said injuries and death were caused wholly by the negligence of defendants as alleged in their Second Amended Original Petition.

2. Plaintiffs specially deny the allegations in paragraph eight of defendants' said answer, wherein it alleges that the said J. T. Bigger died of a cause, other than his said injuries, but allege that said injuries and death were directly and proximately caused by defendants' negligence as alleged in their Second Amended Original Petition.

ERNEST FELLBAUM,
CLAUD J. CARTER,
Attorneys for Plaintiffs.

Filed January 6, 1914.

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## DEFENDANTS MOTION TO QUASH CERTAIN QUESTIONS AND ANSWERS IN DEPOSITION OF J. T. BIGGER.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger,
vs. No. 192, *At Law.*
I. & G. N. Ry. Co., et al.

*And Now Comes the Texas & Pacific Railway Co.* for the reasons stated in its former motion, filing this as its additional motion, thereto objects to and moves the Court to strike out the several questions and several answers of the witness J. T. Bigger in his deposition taken in this case heretofore, and for additional objection comes now and says:

I.

It objects to Interrogatory No. 8, in which the witness is asked to state "what orders or commands, if any, were given you by the employee, or employees in charge of the T & P Ry. Co. passenger train with reference to leaving the said train when it came to a stop near Longview, because said question is leading and suggestive and calls for the answer desired, and objects to all that portion of the answer of witness, No. 8, which states that the conductor or the auditor in charge of the train ordered him to leave the train, because it does not state any facts or what language was used, and specially objects to all the balance of said answer because the same is not responsive to the question asked and especially that portion of the answer in which he said he "had two heavy grips and had to get off and take my grips," as not responsive to the question and is a voluntary statement not called for.

II.

Defendant objects to all that part of the answer of witness in his answer to the 10th Interrogatory: "when I got off * * * when I had to get off. I had to get off in this water and set my grips off in it," as wholly not responsive to the question asked and is a voluntary statement of the witness.

III.

Defendant objects to the whole of Interrogatory No. 11 because it is leading and suggestive, and to the entire answer of said witness because it is not responsive to the question and especially all that portion of the answer in which the witness states that he had to take his grips and walk, etc., as wholly not responsive, as immaterial and irrelevant, and an improper answer.

IV.

It moves to strike out that part of the answer of witness to the 13th Interrogatory in which he says: "My suit cases were wet also," as not responsive to the question asked and a voluntary statement of the witness.

V.

It objects to Interrogatory 14 as leading, suggestive and calling for a conclusion of the witness and not an interrogatory asking for statement of facts, and objects to the entire answer of the witness for the same reasons, because there are no facts or circumstances stated, requiring the said Bigger to remain in the rain, the same is a voluntary statement, irrevelent and immaterial; is a conclusion of the witness, and further specially objects and moves to strike out all the balance of that answer, towit: "With my grip I got along very slowly. I was also compelled to get in the rain again when I got on the I. & G. N. train after leaving the T & P train," because the same is not responsive to the question, is a voluntary statement, immaterial and irrelevant to any issue in this case and not called for by the question propounded.

VI.

Defendant objects to Interrogatory No. 16, because it is leading, suggestive and calls for the answer desired, is immaterial and irrelevant; and objects to all that part of the answer of the witness, as follows: "caused me to take a bad cold from which I have never recovered," as not responsive to the question, a conclusion, and the whole of said answer, and the said question should be stricken out.

VII.

Defendant objects to Interrogatory No. 17, because it is leading, suggestive and calls for a conclusion of the witness and does not call for a statement of facts; and objects to the entire answer of said witness because the same is not responsive to the question, is a statement or conclusion and not a statement of facts, and said question and answer should be stricken out.

VIII.

Defendant objects to all that part of the answer of said witness to Interrogatory No. 21, in which he states: "I got a job in San Antonio, out of which I ought to have made $200.00 per month had I been able to have taken it," because said answer is a voluntary statement, is an improper answer and states the conclusion of the witness, and is improper and misleading.

IX.

It moves to strike out that portion of answer of the witness to Interrogatory No. 22, in which he says:

"Have been in bed practically ever since," as a voluntary statement, conclusion of the witness and immaterial and irrelevant.

X.

Defendant moves to strike out that part of the answer of witness to Cross Interrogatory No. 5, in which he states: "and I worked for the Kentucky Electric Company," because the same is not responsive to and called for by the question, and is a voluntary statement.

XI.

Defendant objects to that portion of answer of the witness to Cross Interrogatory No. 7, in which he states, "they all got wet," as a voluntary statement not called for by the question and not responsive thereto.

Wherefore, for all of the reasons given aforesaid, defendant prays the judgment of the Court that the same be stricken from the Record; wherefore, etc.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant Texas & Pacific Ry. Co.
GUINN & McNEILL,
Attorneys for Defendant, St. L., I. M. & S. Ry. Co.

The International & Great Northern Railway Co. comes and joins in the foregoing motion and prays judgment of the Court.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant, I & G N Ry. Co.
GUINN & McNEILL,
Attorneys for Defendant, St. L., I. M. & S. Ry. Co.

Filed January 5th, 1914.

## ORDER ON MOTION TO STRIKE OUT CERTAIN PORTIONS OF THE DEPOSITION OF J. T. BIGGER, DECEASED.

In the United States District Court Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192 *Law.*
I. & G. N. Ry. Co. et al.

On this the 6th day of January, 1914, came on to be heard the motion of defendants to quash and strike out certain questions and answers of J. T. Bigger, deceased, and the Court, after hearing the same, granted said motion as to the following:

That part of answer to Interrogatory No. 8, as follows: "had two heavy grips and had to get off and take my grips."

That part of the answer to Interrogatory No. 10 viz: "Where I got off. There must have been an inch or two of water where I had to get off. I had to get off in this water and set my grips off in it."

That part of the answer to Interrogatory No. 13, viz: "My suit cases were wet also."

That part of the answer to Interrogatory No. 21, viz: "I got a job in San Antonio, out of which I ought to have made $200.00 per month had I been able to have taken it."

Also as to the balance thereof, to-wit:

All of Interrogatory No. 8 and to the answer to Interrogatory No. 8, exclusive of that portion of the answer as follows: "had two heavy grips and had to get off and take my grips."

The whole of Interrogatory No. 11, and the entire

answer thereto, and especially that portion of the answer in which the witness states: "I took my two grips and had to walk about one-third the distance of a block," etc.

All of Interrogatory No. 14 and the entire answer thereto, and especially that part of the answer, to-wit: "With my grips I got along very slowly. I was also compelled to get in the rain again when I got on the I & G N train after leaving the T & P train."

All of Interrogatory No. 16, and that part of the answer thereto as follows: "caused me to take a bad cold from which I have never recovered."

All of Interrogatory No. 17 and the entire answer of the witness thereto.

That part of the answer to Interrogatory No. 22 as follows: "Have been in bed practically ever since."

That part of the answer of the witness to Cross Interrogatory No. 5, as follows: "and I worked for the Kentucky Electric Company."

That portion of the witness' answer to Cross Interrogatory No. 7, as follows: "they all got wet." the court overruled; and as to which ruling the defendants then and there in open court excepted.

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JUDGE.

Filed January 8th, 1914.

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## CHARGE OF THE COURT.

In the United States District Court Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192 *Law.*
International & Great Northern Ry. Co.

Gentlemen of the Jury:

This suit was originally instituted by J. T. Bigger for recovery of damages against the International & Great Northern Railway Company, and the Texas & Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company. After the original petition was filed the Plaintiff departed this life in the month of February, 1913, and his surviving wife and his six children have made themselves parties. Of the six children, James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger and Robert L. Bigger are minors, and the other child, Charles H. Bigger, is about 22 years of age. As the suit now stands, it is in the name of Ludie Bigger, the surviving wife, in her own right, and in the name of the five minor children by their mother, Ludie Bigger, as next friend, and also in the name of Charles H. Bigger, as Plaintiffs. You are instructed under the evidence in this case, to return a verdict in favor of the International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company. The suit will then stand in the name of the Plaintiffs above mentioned against the Texas & Pacific Railway Company, and this Company will hereinafter be referred to as the Defendant.

The Plaintiffs maintain that the Defendant was guilty of several distinct acts of negligence, each of which caused and contributed to produce the illness and death of said J. T. Bigger. Without copying

the entire petition, the Plaintiffs charge the following acts of negligence:

First. That the train of the Texas and Pacific Railway Company, upon which the said J. T. Bigger was a passenger from Texarkana, Texas, until it reached the point near Longview, Texas, where it stopped, had a passenger coach attached, which continued beyond Longview, Texas, over the line of railway of the defendant, International & Great Northern Railway Company, and as far as San Antonio, Texas; that said defendant, Texas & Pacific Railway Company, its servants and employes, knew that said J. T. Bigger's destination point was San Antonio, Texas, yet, notwithstanding such knowledge, they negligently failed to inform or notify said J. T. Bigger that this through passenger coach was in said train upon which he was riding, and negligently failed to give him an opportunity to safely enter said car while the same was attached to the train upon which he was a passenger before he was ordered to leave said train at or near Longview, Texas, by passing through the other cars in said train to said through cars, and thus would have avoided the exposure of the said J. T. Bigger to said rain and water, and the defendant's negligence in this respect directly caused and contributed to the illness and death of the said J. T. Bigger.

Second. That when said train came to a stop at or near the station of Longview, Texas, it was raining and the ground was covered with water, and the said defendant, Texas & Pacific Railway Company, its servants and employes negligently ordered and commanded the said J. T. Bigger to leave the said train in said rain and water and by reason of such negligence he was compelled to so leave said train and thus

be exposed to said rain and water, and said defendant was guilty of negligence in thus exposing him to said rain and water and in not providing a reasonably safe and protected place for him to alight, and therefore, plaintiffs allege that the defendant's negligence in this respect directly caused and contributed to the illness and death of the said J. T. Bigger.

Briefly stated, the Defendant denies that it was guilty of any negligence causing or contributing to the illness and death of the deceased. The answer further avers that the deceased, J. T. Bigger, could easily, by the exercise of ordinary care, have walked from the Texas & Pacific coach, before reaching Longview Junction, into the International & Great Northern coach without exposing himself to the weather. It is further averred in the answer that the defendant had sufficient station buildings at Longview Junction for passengers, and that the deceased, Bigger, could easily have gone to said buildings for shelter from the rain; and that if he failed to do so and was exposed to the rain for any length of time, then the exposure, it is averred, was the result of his own negligence and want of care in standing in the rain and refusing to go to a place of shelter provided for passengers. It is further averred that the ill health of the deceased was not caused by nor was the result of any negligence on the part of the defendant; that deceased was, on the 10th day of August, 1912, in an extremely poor state of health and had for a long time been the victim of a tubercular infection and that his death was the direct and proximate result of said infection and not directly and proximately caused by this defendant. And it may be further stated that, generally speaking, the

defendant pleads contributory negligence on the part of the deceased.

The Plaintiffs, as already intimated, in their petition attribute the illness and death of the deceased to the negligence of the defendant as the direct cause of same. Hence it is incumbent upon them to establish, by preponderance of the evidence, the truth of the charge they prefer. Therefore, if his illness and subsequent death did not result directly from the negligence of the defendant, they would not be entitled to recover. What then is negligence? It is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person, under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. (See 95 U. S. 441-442).

Coming to the proof: it is evident that the deceased was a passenger on the Texas & Pacific train proceeding from Texarkana west to Fort Worth and El Paso; that there was among the coaches of that train a day coach of the International & Great Northern Railway Company destined to San Antonio, which point was the destination of deceased. It also appears from the proof that the deceased was seated in a Texas & Pacific coach which was destined to points west of Longview. The Texas & Pacific train connected with the International & Great Northern train at Longview Junction. At that point it became necessary to detach from the Texas & Pacific train the International & Great Northern car for San Antonio and attach it to the latter train. The Texas & Pacific train reached Longview Junction on August 10, 1912; and it is claimed by the Plaintiffs that the deceased

was required, when defendant's train stopped at Longview Junction, to leave the train in a hard, severe rain, and that in going from the train to a small switch shanty, his clothing became thoroughly drenched. It is further claimed that after he entered the International & Great Northern train for San Antonio, his clothing remained in that drenched condition until he arrived in San Antonio about 11 o'clock on the same night. The contention of Plaintiffs is that the illness and death of the deceased resulted from the rain to which deceased was exposed through the negligence of the defendant.

You are instructed that, as a common carrier, the duty of the defendant to passengers on its train did not end by merely stopping the train at Longview Junction. It was its duty to provide adequate and safe accommodations for passengers where they could alight to change cars and where they could be protected from the inclemency of the weather. If they provided such safe and adequate accommodations and such as to protect the passengers from the inclemency of the weather, then the defendant had fulfilled its duty under the law; and for any injury to the deceased resulting from getting off the train at the point mentioned, no recovery could be had. If, however, the defendant did not provide for its passengers such accommodations as just described; and, further, if the employes of the defendant required the deceased to get off the train in a severe rain, and his illness and death resulted therefrom, without any fault or negligence on his part, the plaintiffs would be entitled to recover. In this immediate connection you are further instructed that the deceased was required to look out for his own comfort and safety; and if he was in any respect guilty of negligence contributing

to his illness and death, then no recovery can be had by the Plaintiffs in this proceeding.

In this connection it is claimed by the defendant that its employes and agents notified the deceased, before the arrival of the train at Longview Junction, that passengers destined for San Antonio should leave the coach of the defendant and go back to the International & Great Northern coach, whose destination was San Antonio. If the employees and agents did, as defendant contends, notify the deceased, as stated, then it was his duty to leave the Texas & Pacific coach and go to the International & Great Northern coach for the purpose of being transported to his destination; and if the deceased failed to act upon such notification and go back to the International & Great Northern coach, then he so far contributed to his illness and death as would prevent a recovery on the part of the Plaintiffs. You will observe right at this point that there was a sharp conflict in the testimony,—the defendant contending that such notification was given to the passengers in the Texas & Pacific coach, and the plaintiffs contending that the deceased had no such notice. This question of fact, like all other questions of fact in the case, you will determine from a consideration of all the facts and circumstances in evidence. To entitle the plaintiffs to a recovery, the illness and death of the deceased must be attributable directly to the negligence of the defendant. If, therefore, his illness and death are not attributable to the negligence of the defendant, then no recovery can be had. If his illness and death were due to some other cause, for example, pulmonary tuberculosis, from which he had previously suffered, and did not result directly from

the negligence of the defendant, then the plaintiffs are not entitled to recovery in this case.

If, in view of the testimony and the foregoing instructions, your verdict be in favor of the plaintiffs, you will then proceed to consider the amount of damages to which they may be entitled. The statute applicable to suits of this character provides, substantially, that the jury may give such damages as they may think proportioned to the injury resulting from such death. As construed by the Courts, the meaning of the provision is that damages given by such statutes are measured by the pecuniary injury to the respective parties entitled, including the loss of prospective damages. The measure of damages is not the same as when a party himself sues for injuries received and recovers compensation for physical and mental suffering. The damages then must be measured by the pecuniary—money—injury to the respective plaintiffs. They are not entitled to recover anything for mental pain which they may have suffered on account of the death of the deceased, nor for any physical or mental suffering which he himself endured. If the deceased had been simply injured and had not died, and brought suit himself, the rule would be otherwise. For in that case the law would permit him to recover, if entitled to recovery at all, damages for mental and physical pain and suffering. But in cases of this kind the damages must be measured by the pecuniary standard, that is, the money value of the life of the deceased to his surviving wife and children; and the jury, acting upon their sound, deliberate judgment, based upon the facts and circumstances in evidence and their own knowledge and experience and sense of justice, may give such damages to the plaintiffs as they may think proportioned to

the injury resulting to them from the death of the deceased. If your verdict be in favor of the plaintiffs, you will divide the amount of damages awarded between the plaintiffs in such shares as you may think each entitled to receive under the evidence and these instructions.

If, therefore, your verdict be in favor of the plaintiffs, you will return it in the following form: "We the jury find in favor of the two defendants, the St. Louis, Iron Mountain & Southern Railway Company and the International & Great Northern Railway Company, and further find in favor of the plaintiffs and assess the aggregate amount of damages at ..... dollars. Of the amount of damages so found we award first, to the plaintiff Ludie Bigger, the sum of .....dollars; second, to Charles H. Bigger, the sum of .....dollars; third, to James M. Bigger, the sum of ..... dollars; fourth, to Ruth H. Bigger, the sum of ..... dollars; fifth, to Lucy F. Bigger, the sum of ..... dollars; sixth, to Virginia G. Bigger, the sum of ..... dollars; seventh, to Robert L. Bigger, the sum of ..... dollars," you to fill up the blanks with the amounts which you may find and award the parties.

If your finding be in favor of the defendant, you will simply say: "We the jury find for the defendant, and also for the I. & G. N. Ry. Co., and the St. Louis, Iron Mountain and Southern Railway Company."

You are the exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony, and you will give it such weight as in your judgment it may be entitled to receive.

You have been told that it is incumbent upon the

plaintiffs to prove negligence on the part of the defendant by a preponderance of the evidence. So also it is incumbent upon the defendant to prove contributory negligence on the part of the deceased by a like preponderance of the evidence.

T. S. MAXEY,
Judge.

Filed January 8, 1914.

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## EXCEPTIONS OF THE DEFENDANT, TEXAS & PACIFIC RAILWAY COMPANY TO THE GENERAL CHARGE OF THE COURT.

The United States District Court Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192 *At Law.*
I. & G. N. Ry. Co. et al.

Defendant excepts in open court to the Court's general charge because:

(1) He has not charged all the law on the question of the duty of a passenger while riding on the train.

(2) Because he has emphasized too much the duties of the carrier.

(3) Because the Court has erred in charging the jury that it is the duty of the railroad company to provide adequate accommodations for passengers where they could alight to change cars and where they could be protected from the inclemency of the weather: There is no evidence that they did not provide an adequate place for them to alight.

(4) Because it was error in the Court to submit to the jury to ascertain if the employees of the defendant required the deceased to get off the train in a severe rain and his illness and death resulted therefrom, without any fault or negligence on his part and plaintiffs would be entitled to recover; because there is no evidence that he was compelled to get off.

(5) Because the Court erred in instructing the jury that as a common carrier the duty of the defendant to its passengers on its train did not end by merely stopping the train at Longview Junction; whereas the duty of the railroad, as common carrier and the relation of passenger ceased when the railroad gave a proper place for the passengers to get off, and that the passenger did get off at a safe place, the duty of the common carrier and the relation of passenger then ceased; and the duty alone was not on the Texas & Pacific to take care of passengers travelling on a through ticket, and the Texas & Pacific had performed its duty in carrying the passenger safely to Longview.

COBBS, ESKRIDGE & COBBS,
& TEX SCHRAMM.

Filed January 8, 1914.

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SPECIAL CHARGE 23 REQUESTED BY DEFENDANT, TEXAS & PACIFIC RY. CO.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

Special Charge No. . . . . Requested by the Defendant, Texas & Pacific Ry. Co.

Gentlemen of the Jury:

Defendant requests the Court to instruct the jury if they believe from the evidence that J. T. Bigger was sick prior to the alleged injury, and would have continued to get worse, whether he got wet or not and died as the result of his prior disease, if any, the jury will not consider any damages alleged or claimed, if any, the proximate result of his own condition.

COBBS, ESKRIDGE & COBBS.

Given.

T. S. MAXEY,
Judge.

Filed January 8, 1914.

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SPECIAL CHARGE NO. 24 REQUESTED BY DEFENDANT TEXAS & PACIFIC RY. CO.

The United States District Court Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192 *Law.*
I. & G. N. Ry. Co. et al.

Gentlemen of the Jury:

If you should find that J. T. Bigger, prior to his injuries, was suffering with any disease or complaints, and should also find from the testimony that such disease or complaints, if any, were such as he

would have gotten well of; and that the negligence, if any, of the defendant, aggravated such disease or complaints, then plaintiffs would only be entitled to recover for such injuries or augmented suffering as were caused and produced alone as the direct and proximate result and consequence of the negligent acts of the defendant, if any as charged, taking into consideration his prior condition of health in determining how much the defendant, if any, aggravated the sickness and caused the injury which resulted in the death of the deceased, which would not otherwise have occurred, growing out of his previous condition prior to the time he got wet.

COBBS, ESKRIDGE & COBBS,
& TEX SCHRAMM.

Given.

T. S. MAXEY,
Judge.

Filed January 8th, 1914.

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SPECIAL CHARGE REQUESTED BY DEFENDANT, TEXAS & PACIFIC RY. CO. NO. 25.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

Special Charge No. ....Requested by the Defendant, Texas & Pacific Ry. Co.

Gentlemen of the Jury:

The Defendant requests the Court to charge the jury that if they believe from the evidence that the condition of plaintiff when he entered the cars for a trip to San Antonio, Texas, was sick with lung trouble or consumption and that he knew at that time the condition of his health was such as to increase the chances of injury by exposure, and in such condition he failed to use ordinary care and prudence to protect himself against any contingency that might arise during such journey, and that but for his condition and want of ordinary care at that time, and changed cars by going out in the rain, when by the use of ordinary care he could have avoided doing so, if you believe there was a safer way for him to go, which he might have ascertained by ordinary care and have gone so he would not have gotten wet and failed to do so, then defendant would not be responsible for any injury that did result, if any, in transferring from the Texas & Pacific Ry. cars to the International & Great Northern Ry. cars, through the rain and water, if there was such. In arriving at your verdict you will consider all the facts and circumstances in connection with his condition and then determine whether or not he used that ordinary care and prudence which an ordinary prudent person would have exercised under similar circumstances.

COBBS, ESKRIDGE & COBBS,

Given.

T. S. MAXEY,
Judge.

Filed January 8, 1914.

## PLAINTIFFS' SPECIAL CHARGE NO. 1.

The District Court of the United States Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

Gentlemen of the Jury:

At the request of the Plaintiffs you are instructed as follows:

The defendant, Texas & Pacific Railway Company, owed to its passengers the duty to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances, and the failure to exercise such degree of care would be negligence.

H. C. CARTER AND
FELLBAUM & CARTER,
Attorneys for Plaintiffs.

Given.

T. S. MAXEY,
Judge.

Filed January 8, 1914.

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## VERDICT.

To Hon. Judge Maxey,
Western District of Texas, San Antonio Division.
Sir:

We the jury find in favor of the two defendants, the St. Louis, Iron Mountain & Southern Railway Company and the International & Great Northern

Railway Co., and further find in favor of the plaintiffs and against the defendant Texas & Pacific Ry. Co., and assess the aggregate amount of damages at $15,250.00. Of the amount of damages so found we award first, to the plaintiff Ludie Bigger, the sum of $5000.00; second, to Charles H. Bigger, the sum of $1000.00; third, to James M. Bigger, the sum of $1250.00; fourth, to Ruth H. Bigger, the sum of $2000.00 (two thousand dollars); fifth to Lucy F. Bigger, the sum of two thousand dollars (2000.00); sixth, to Virginia G. Bigger the sum of two thousand dollars ($2000.00); seventh, to Robert L. Bigger, the sum of two thousand dollars ($2000.00).

R. A. HOLLAND,
Foreman.

Filed January 8, 1914.

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## JUDGMENT.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, At Law.
International & Great Northern Railway Company, Texas & Pacific Railway Company and St. Louis Iron Mountain & Southern Railway Company.

On this the 6th day of January, A. D. 1914, came on to be called for trial the above numbered and entitled cause in its regular order upon the docket, and thereupon came the plaintiffs, and the defendants, and

announced ready for trial, and then came a jury of twelve good and lawful men, to-wit: R. A. Holland, and eleven others, who after being duly tried, empaneled and sworn in said cause, heard the pleadings, the evidence, the argument of counsel and the charge of the Court, and thereupon retired to consider its verdict, and thereafter, to-wit: on the 8th day of January, A. D. 1914, returned into open court the following verdict to-wit.

"To Hon. Judge Maxey,
Western District of Texas, San Antonio Division.
Sir:

We the jury find in favor of the two defendants, the St. Louis, Iron Mountain & Southern Railway Company and the International & Great Northern Railway Company and further find in favor of the plaintiffs and against the defendant, Texas & Pacific Ry. Co., and assess the aggregate amount of damage at $15,250.00.

Of the amount of damages so found, we award first, to the plaintiff, Ludie Bigger, the sum of $5000.00; second, to Charles H. Bigger, the sum of $1000.00; third, to James M. Bigger, the sum of $1250.00; fourth, to Ruth H. Bigger, the sum of $2000.00, (two thousand dollars); fifth, to Lucy F. Bigger, the sum of two thousand dollars ($2000.00); sixth, to Virginia G. Bigger, the sum of two thousand dollars ($2000.00); seventh, to Robert L. Bigger, the sum of two thousand dollars ($2000.00).

R. A. HOLLAND.
Foreman."

which said verdict was duly received, read in open Court to the jury, who announced that it was their verdict, and said verdict was thereupon approved by

the Court and ordered to be filed, and judgment is now rendered thereon.

It is, therefore, ordered, adjudged and decreed by the Court that the plaintiff, Ludie Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Five Thousand ($5000.000) Dollars; that the plaintiff, Charles H. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of One-Thousand ($1000.00) Dollars; that the plaintiff, James M. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of One-Thousand Two-Hundred and Fifty ($1250.00) Dollars; that the plaintiff, Ruth H. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Two-Thousand ($2000.00) Dollars; that the plaintiff, Lucy F. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Two-Thousand ($2000) Dollars; that the plaintiff Virginia G. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Two-Thousand ($2000.00) Dollars; and that the plaintiff, Robert L. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Two-Thousand ($2000.00) Dollars, and that all of the above sums of money, bear interest from the 8th day of January, A. D. 1914, at the rate of six per cent per annum, and that plaintiffs recover all costs in this behalf expended, for all of which let execution issue.

It is further ordered, adjudged and decreed by the Court that the plaintiffs take nothing as to the defendants, International & Great Northern Railway Company and the St. Louis, Iron Mountain & South-

ern Railway Company, and that said defendants go hence without day and recover of plaintiffs all costs in their behalf expended, for which execution may issue. To all of which the defendant, the Texas & Pacific Railway Company, by its attorney in open court excepted.

Filed January 8, 1914.

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## ORDER STAYING EXECUTION AND EXTENDING TIME IN WHICH TO PREPARE AND FILE BILLS OF EXCEPTION.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

And now comes on to be heard motion made by Defendant, Texas & Pacific Railway Company, asking sixty days time in which to stay execution and ninety days to prepare for Writ of Error, Bills of Exception, etc., and after having considered the same fully, it is therefore Ordered, Adjudged and Decreed that the said execution directed in the judgment of the Court herein on the verdict of the jury, shall not be issued as prayed before sixty days after the adjournment of this term of this Court.

It is also further Ordered that the defendant shall have ninety days from and after the adjournment of this Court in which to prepare and present for approval and to file its Bills of Exception.

Dated this 8th day of January, A. D. 1914.

Filed January 8, 1914.

## ORDER OVERRULING PLEAS AND EXCEPTIONS OF DEFENDANTS TO JURISDICTION, ETC.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

On this the 6th day of January 1914, came on to be heard the above stated cause and the Court after hearing and considering the pleas and exceptions filed by the International & Great Northern Railway Co., the Texas & Pacific Railway Co. and St. Louis, Iron Mountain & Southern Railway Co., and the pleas and exceptions therein presented by each of said defendants to the jurisdiction of the Court to try said cause and otherwise, who duly heard and considered the same, and who then and there overruled each one separately and severally, to which ruling of the Court defendants did then and there in open Court except to said judgment and prayed that the same be made a Record in said cause, which is accordingly done.
Filed January 8, 1914.

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## MOTION FOR NEW TRIAL.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

*Now Comes the Defendant herein* and moves the Court to set aside verdict of the jury herein and the judgment thereupon, and grant it a new trial for the following reasons, to-wit:

I.

Because the verdict of the jury is contrary to the law.

II.

Because the verdict of the jury is contrary to the evidence.

III.

Because the Court erred in its General charge to the jury, as shown by the exceptions, taken at the time, thereto.

IV.

Because the Court erred in refusing to give Special Charges requested by the Defendant as follows: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

V.

Because the Court erred in giving Special Charge No. 1 asked by the Plaintiff, as follows:

"The defendant, Texas & Pacific Railway Co., owed to its passengers the duty to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances and the failure to exercise such degree of care would be negligence."

VI.

Defendant further says that the verdict of the jury not only was contrary to the law and the evidence, but that the same was highly excessive, especially so as to the amount given the widow and elder children, as well as that given to the minors, was not justified by the evidence for this, it was proven that at the time the deceased got wet he got wet on account of his own contributory negligence and even then he was a sick man; he had consumption and if he had taken care of himself he would not have gotten wet and would not have continued wet to San Antonio, and in view of the fact that he was a sick man and consumptive, forty-nine years of age, it was not probable that he would live the period of time allotted to man; and further, because the jury should have taken into consideration his physical condition with reference to his earning capacity and allowed him credit in assessing the verdict in proportion to his diminished capacity to earn money thereafter, for the railroad company could not have been guilty alone of that condition and rendering it a permanent injury since the disease was there, and in all probability without regard to the wetting, would have become more violent and would have in a short time taken his life.

VII.

This Defendant says that it has not been possible for the stenographer to write out the testimony in time for it to more definitely set out the many errors committed in the trial of the Court, but the Court's attention will be called especially to other phases of the case when this motion is presented.

Wherefore, Defendant asks for a new trial and if that is not granted, that then plaintiff be required to remit part of the judgment rendered in this cause and prays the Court to indicate in his judgment what sum should be remitted out of each recovery.

Wherefore, Defendant prays for all relief to which it may be entitled and the judgment of the Court upon a consideration of all the testimony introduced herein.

COBBS, ESKRIDGE & COBBS,
TEXAS SCHRAMM.

Attorneys for Defendant, Texas & Pacific Ry. Co.

Filed January 23, 1914.

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## ORDER OVERRULING MOTION FOR A NEW TRIAL.

J. T. Bigger
vs. No. 192, *At Law.*
Texas & Pacific Railway Company.

Friday, January 23, A. D. 1914.

Now on this day came on to be heard before the Court the motion of the defendant, Texas & Pacific Railway Company, to set aside the verdict and judgment heretofore rendered and entered herein and to grant it a new trial of this cause. And said motion and the argument of counsel thereon having been heard and duly considered, it is the opinion of the Court that the said motion should be in all things overruled, and it is accordingly so ordered, to which ruling of the Court the defendant, Texas & Pacific Railway Company, by its attorney, in open Court excepted.

Filed January 23, 1914.

## BILL OF EXCEPTION NO. 1.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

Bill of Exception No. 1.

*Be It Remembered* that on the trial hereof the defendants presented their several pleas in writing, and on file herein, to the jurisdiction of the Court, to all of which pleadings reference is made as a part hereof, likewise as though written herein fully at length, and to all other pleadings on file as a part hereof.

When and thereupon the Court overruled said pleas to the jurisdiction of said Court, as follows:

"On this the 6th. day of January, 1914, came on to be heard the above stated cause and the Court after hearing and considering the pleas and exception filed by the International & Great Northern Railway Co., the Texas & Pacific Railway Co., and St. Louis, Iron Mountain & Southern Railway Co., and the pleas and exception therein presented by each of said defendants to the jurisdiction of the Court to try said cause and otherwise, who duly heard and considered the same, and who then and there overruled each one separately and severally, to which ruling of the Court defendants did then and there in open Court except to said judgment and prayed that the same be made a record in said cause, which is accordingly done."

To which action and ruling of the Court, noted in the judgment of the Court, to which reference is made, was then and there in open Court in all things

excepted to by all the defendants to the end that said rights should be preserved and said rulings of the Court reviewed, which is here for said purpose accordingly done and signed nunc pro tunc as of January 8th, 1914.

Signed March 18, 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION NO. 2.

In the United States District Court Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192 *Law.*
I. & G. N. Ry. Co., et al.

*Be it Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, before the jury retired to consider their verdict and after all the evidence in said cause had gone to the jury, all of which evidence is fully set out as a part hereof and annexed to this Bill of Exception, on Special Charge No. 1 requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

"And now comes the Defendant and moves the court, and requests the Court to instruct a verdict

for the Defendant, Texas & Pacific Railway Company.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant.

Refused.

T. S. MAXEY,
Judge."

That the said motion for instructed charge, was asked upon the contention of defendant's that there was no evidence to support the judgment for the plaintiff and all the evidence introduced in the trial of said cause, is included and embraced in the following testimony, except such as may be embraced in other Bills of Exception, and all of said testimony is as follows, towit:

J. E. Barnett, who was permitted by the Court to give his testimony out of order on account of being called out of the city, was duly sworn and testified as follows:

DIRECT EXAMINATION.

My name is J. E. Barnett. I live in Fort Worth. My business is that of a brakeman on the Texas & Pacific railroad. I have been working for the Texas & Pacific railroad about 12 years, and am working for said railroad at the present time. It is the duty of the brakeman, and was my duty on the 10th of August, 1912, to go into the Texas & Pacific car and the International & Great Northern car, upon their arrival at Texarkana, and ascertain from the passengers their destination; and then tell them if they are destined to points on the International & Great Northern Railroad to go into the Inter-

national and Great Northern car, and if destined to points on the Texas & Pacific to go into the Texas & Pacific car. On August 10th, 1912, I was on Second No. 3 of the Texas & Pacific Railway Company. On that date I went into the respective cars and told the passengers what to do. I asked each passenger individually relative to his destination. The train in question was received from the Iron Mountain at Texarkana, and contained an International & Great Northern coach. I do not know where such International & Great Northern coach came from except that it came in on the Iron Mountain train. The Texas & Pacific car and the I. & G. N. car come into Texarkana coupled together; and at Texarkana an I. & G. N. car is put on the rear end of the train, and the Pullman car going to El Paso on the Texas & Pacific is put between the I. & G. N. car and the Texas & Pacific car. Then when the train reaches Longview Junction the I. & G. N. car is taken off the rear end of the Texas & Pacific train and placed on the I. & G. N. train. The train is arranged at Texarkana in order to avoid switching at Longview Junction. At Longview Junction the I. & G. N. car and generally two or three I. & G. N. Pullmans are detached from the Texas & Pacific train and put on the I. & G. N. train. On the 10th of August, 1912, I stopped at Marshall. The reason for that was because the train I was on consolidated with another train and I turned at Marshall and came back. I do not remember whether there was 2 sections of it or not; but the first No. 3 came and we came on behind it. I was on what was known as No. 3, but I don't remember whether it was the first or second. I am positive I made the announcement to each passen-

ger as stated above on August 10th, 1912, as I do that every trip and those are my instructions. I make that announcement only at Texarkana. Sometimes the coach destined for Texas & Pacific points is an Iron Mountain coach or a Missouri Pacific coach and sometimes it is a Texas & Pacific coach. I do not know whether the Texas & Pacific coach was so marked on the occasion in question, or whether it was a Missouri Pacific or Iron Mountain coach; but we always find out which coach is destined for Texas & Pacific points and which coach is destined for I. & G. N. points. A passenger boarding the train can distinguish an I. & G. N. coach from a Texas & Pacific or a Missouri Pacific coach by the fact that the I. & G. N. coach is plainly marked I. & G. N. on the outside. All the cars are marked so one can read what they are. I remember the occasion in question and that I made the unsual announcement.

## CROSS EXAMINATION.

I have been both a freight brakeman and a passenger brakeman, but I am now a passenger brakeman. On August 10th, 1912, I had been working extra as a passenger brakeman and was doing both passenger and freight braking. I get on the train in question at Texarkana. The Iron Mountain railroad brings the train into Texarkana, and then the Texas & Pacific receives it and takes it to Longview Junction. The Texas & Pacific takes the Iron Mountain connections. I do not know whether the International & Great Northern is a part of the Missouri Pacific system. It is true they run Missouri Pacific cars on the Texas & Pacific railroad West.

I cannot remember that I had anything to call to my attention the fact that I made the usual announcement upon the occasion in question; but I did what I was instructed to do, and I presume I performed my regular duties. I know that I informed the passengers that the I. & G. N. car went on the I. & G. N. train on the occasion in question because I do that all the time. That is the only way I know I told them upon the occasion in question. I go to each passenger and tell him to go into the I. & G. N. car in order to avoid changing at Longview. Some times the I. & G. N. car, which I instruct the passengers to enter, is ahead and sometimes it is behind; it is not always in the same position in the train. It is my duty to point out the car which carries the passengers to their destination, and I always try to perform that duty, of course. I could not say what time at night the train in question arrived at Texarkana, but it was late on the occasion in question. I do not know how late it was, but it was probably three hours or more late. We are always called before the arrival of the train; but I cannot remember when the train arrived on the 10th of August. From Texarkana to Marshall is 67 miles. I gave no notice to the passengers to change after we left Texarkana.

## RE-DIRECT EXAMINATION.

The passengers do not always transfer at Texarkana, but they some times say, "We will wait until we get to Longview." Some of them transfer and some do not.

Thereupon the Plaintiff, through his counsel, offered in evidence the depositions of J. T. Bigger, as follows:

## DIRECT INTERROGATORIES.

My name is J. T. Bigger; I will be 50 years old the 22nd day of April, 1913. My occupation is that of electrician. I reside in San Antonio, Texas, and have resided here since March, 1912. I am the plaintiff in this suit instituted by me against the defendants for damages for personal injuries received by me while a passenger on the train of the defendant Texas & Pacific Railway Company on or about the 10th day of August, 1912, at or near Longview, Texas. I was a passenger on the Texas & Pacific railway on the date mentioned; and I had a ticket which entitled me to ride as a passenger on said train. I purchased said ticket in San Antonio, Texas, from the International & Great Northern Railway Company. Said ticket entitled me to ride as a passenger over the International & Great Northern Railway, the Texas & Pacific Railway, the Iron Mountain railway and the L. & N. railway; and permitted me to ride as a passenger from San Antonio, Texas to Nashville, Tennessee, and return. I do not recall the exact date upon which I purchased said ticket, but to the best of my recollection it was about the 20th or the 21st day of June, 1912. Said ticket was a round trip ticket and entitled me to transportation from an Antonio, Texas, to Nashville, Tennessee and return. I was a passenger on the defendant Texas & Pacific railway company's train on or about the 10th day of August, 1912 by authority of said round trip ticket. The train upon

which I was riding arrived at the station in Longview, Texas, some time during the forenoon of August 10th, 1912, to the best of my recollection. The train was late when it arrived there. When the train arrived at the station in Longview, either the conductor or the auditor, who was in charge of the train ordered me to leave the train. It was raining in torrents. I told this party that I did not want to get off in the rain and he stated that I would have to get off because they could not hold the train there on account of the rain. The employe in charge of the Texas & Pacific train upon which I was a passenger on said date saw the ticket upon which I was riding. I do not know where said ticket is now. The ticket was taken up by the conductors of the trains on which I rode. At Longview Junction on the date mentioned the ground was very wet where I got off. There must have been inch or two of water where I had to get off. The rain was falling in sheets. I got off in the rain and took my two grips and had to walk about one-third the distance of a block before I got to a shelter. I stepped in a place used as a railroad office. I got thoroughly soaked by the rain. The rain was falling in torrents at the time I got off. I could scarcely see the depot which was about a block away. I got thoroughly soaked. There did not seem to be a dry thread on me; and my shoes were full of water. I was required to remain in the rain a sufficient length of time to walk the distance from the train to the shelter above referred to, which was about one-third of a block. With my grips I got along very slowly. I was also compelled to get in the rain again when I got on the I. & G. N. train after leaving the Texas & Pacific train. There was a

coach in the Texas & Pacific train upon which I rode into Longview that came through to San Antonio on the line of the International & Great Northern. I know this because I saw the coach and saw people in it after leaving Longview who were not met. They just remained in this coach and did not get off. I asked the conductor on the International & Great Northern Railway Company's train, after leaving Longview, about the through coach and he stated that there was a coach in the train we were then on that was brought into Longview on the train I came in on. He stated that the coach came all the way through from St. Louis. I had to wear my wet clothes from the time I got wet until about 11:30 o'clock that night when we arrived in San Antonio. Having to wear the wet clothes, and from being in the rain and being exposed, caused me to take a deep cold, from which I have never recovered. About a week after that I had to go to bed and have been in bed practically ever since. As stated I took a severe cold, and I suffered with soreness in the chest; had aching in the back and have had chilly sensations all the time since then. I have never recovered from the effects of getting wet. I have suffered a great deal and have been unable to sleep and have had no apetite. I have never recovered from said illness and am still suffering from it. Prior to August 10, 1912, I was able to be up and about and was able to do work. I was not a strong man, but was improving until the time I got wet. I have been ill and in bed nearly all the time since August 10th, 1912. In answer to the question as to how much I weighed prior to the time of August the 10th, 1912, and what I weigh now, I will say I weighed 138 pounds. On and before August 10th, 1912, I

earned $150.00 per month. I had just finished, on that date, a six weeks job in Owensboro, Kentucky before I started to San Antonio, about the 8th of August, 1912, and made at the rate of $125.00 per month. I got a job in San Antonio. I have been unable to perform any labor of any kind since August 10, 1912, and have been in bed practically ever since that date.

## CROSS INTERROGATORIES.

It is a fact that I reside in San Antonio, Texas. I moved my family to San Antonio on the 20th of March, 1912. I first came to San Antonio in December, 1911. I have resided at No. 400 Schley Avenue in San Antonio ever since my family came. Before that I stayed at Elliott Flats and took my meals about town. I was at Terrell Wells over two months. Upon first moving to San Antonio I roomed at Elliott Flats near the Court House. Then I went to Terrell Wells for about ten weeks. Then I came back to Elliott Flats, and from Elliott Flats I moved with my family to No. 400 Schley Avenue. I went to Kentucky and remained there a little over six weeks just prior to August 10, 1912. It is a fact that I bought a round trip ticket from San Antonio to Nashville, Tennessee, in June 1912, instead of July, 1912. It is a fact that the ticket which I bought on June 10, 1912 from San Antonio to Owensboro, Kentucky, in fact read to Nashville, Tennessee, but I did not go to Nashville. I bought a ticket from San Antonio to Nashville, but I stopped off at Evansville, Indiana, and went from there to Owensboro, Kentucky. I got on the train at San Antonio and did not stop off until I got to Evansville,

Indiana. I did not stay long there, was not there more than an hour. From there I went to Owensboro. I stopped at the Bell Hotel in Owensboro all the time I was there and while there I worked for the Kentucky Electric Company. I knew May Lambert, E. P. Franks, R. W. Little and a great many others. In fact I knew most of the people in Owensboro as I lived there 14 years. The names of the physicians who have treated me during the last five years are: Dr. McCormick of Owensboro, Kentucky, and Dr. Dougherty of San Antonio, Texas. I do not know from what school of medicine these two doctors are. Dr. McCormick treated me for typhoid fever and also for lung trouble. Dr. Dougherty treated me for lung trouble. I also had Dr. Jackson, whose office is in the Moore Building and who lives on Presa Street, San Antonio. He treated me for lung and stomach trouble. I also had Dr. Wolf to treat me for lung trouble. I do not know Dr. Wolf's address. I do not know from what schools any of these physicians are. I saw only four passengers get off the Texas & Pacific train at the time I got off at Longview. I saw which way they went and followed them to the nearest shelter. My present address is 400 Schley Avenue, San Antonio, Texas, and that was my address on August 11, 1912. The names of four people living close to me at the present time are: Mr. St. John, Mr. Phillips, Mr. Smith and Mr. Boles. I know most of my neighbors residing near me, but can't think of their names. The persons named were my neighbors on the 11th day of August, 1912, and are my neighbors now. Dr. Dougherty was the last physician who saw, examined or treated me prior to August 10, 1912; and he was also the physician who

first treated me after that date. He saw me about the 15th of August, 1912; but I do not recollect when he last saw me prior to August 10, 1912, but I think it had been about two months. It is a fact that my health had been poor for some time prior to August 10, 1912, but it was improving up to the time I got wet. It is true that I had been under treatment. I had not, for a long time prior to August 10. 1912, been under the treatment of an osteopath physician.

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Mrs. Ludie Bigger, a witness for the Plaintiff, having been duly sworn, testified for as follows:

## DIRECT EXAMINATION.

My name is Mrs. Ludie Bigger. My husband is dead. His name was James T. Bigger. He died on February 28th, 1913. I remember his coming home after a trip to Owensboro, Kentucky. I expected him to arrive home early in the evening in time for supper; but it was between 11 and 12 o'clock at night before he came home. I could see from his clothes he had been soaking wet and they were in bad condition. They were still wet and heavy at the time. I hung them out on the line the next morning. The clothes in his valise were also wet, and I hung them out on the line. In two or three days he begun to have fever. He complained of aches and chilly sensation and aching in his chest and back and in two or three days he begun to have fever and went to bed. After he went to bed he still suffered a great deal with the same hurting in

his chest and back and head and he had no appetite at all. He got worse and continued to go down from that time on. He was confined to his bed most all the time after he first went to bed. He was not able to do any work at all after returning from that trip. He arrived home on or about the 10th of August, 1912, and died on February 28th, 1913. From the time he arrived home up to the time he went to bed he complained continually. Before he went to Owensboro on this trip he was a comparatively well man. He had improved so much since he had first come to San Antonio. He left Owensboro first on December 5, 1911, and I left Owensboro on the 20th of March, 1912, and came to San Antonio. When I arrived at San Antonio the deceased weighed 168 pounds and looked the picture of health, and there was a marked improvement in his health. In August, 1911, prior to his first coming to San Antonio, the deceased had had typhoid fever. At that time he was confined to his bed four weeks. After having typhoid fever the deceased never recovered his full strength while in Kentucky and he then came to Texas and I followed him here in order to make our home in Texas. From the time I came to San Antonio up to the time the deceased went back on this trip he seemed to get along fine and improved all the time and he increased in weight and strength. Before the deceased first came to Texas he was superintendent of the lamp factory of the Kentucky Electric Company. He worked for that company 11 years in all and 4 years in the capacity of superintendent. At the time he left their employ he was getting $150.00 per month salary. The reason he came to San Antonio was because he had had typhoid fever and the doc-

tor told him he had lung trouble, and he came for that reason and because he was in a run down condition. After he came to Texas he did not do any work at all. He went back to Owensboro because the Kentucky Electric Company sent for him to come back and break in a new man. He was gone on that trip six weeks. I am 43 years old at the present time; will be 44 in February. My husband was 49 years old at the time of the accident. I have six children. Charles H. Bigger is my oldest son. He is now 22 years old. He works for the Household Furniture & Carpet Company. James M. Bigger is my next son. He is now 16 years old and works for the Kress five and ten cent store. Ruth H. Bigger is my oldest girl. She is 11 years old and goes to school. Lucy F. Bigger is my second daughter. She is 8 years old and lives at home. Virginia G. Bigger is my next child. She is 6 years old. Robt. L. Bigger is my next child and is 2 years old. The children above named are the children of myself and James T. Bigger and were left surviving him. The average earnings of James T. Bigger when he was working was $150.00 per month. James T. Bigger was a very kind man and very devoted to his wife and family. He aided me in every way he could in the mental and moral training of our children. He was always at home and always helped me every way he could; and he was a Christian man, and a member of the Methodist church. I had no means of support for myself and children apart from his labors. James T. Bigger's mother and father are dead.

CROSS EXAMINATION.

I reside in San Antonio and call San Antonio my home and have my residence there. I have made

San Antonio my residence and home since moving there. My husband made San Antonio his residence and home when he first moved there. I came to San Antonio in March, 1912. The deceased came to San Antonio and prepared a home and I came down later. My children were living here with me at the time I filed this suit. The suit was filed on December 5th, 1912, and at that time my home was in San Antonio and it has been my home ever since. I said my husband weighed 168 pounds when I came to San Antonio in March, 1912. I do not know when my husband weighed 138 pounds. He had typhoid fever in August 1911 and was sick 4 weeks. That was in Owensboro, Kentucky. He had never been sick before that time. He had no sickness to amount to anything before that time except a little grippe. He was not very delicate in 1911 until he had typhoid fever. Our family physician, Dr. McCormack told us that my husband had a slight lung trouble after he had typhoid fever, and he came to San Antonio the following December after that typhoid fever in August. The doctor sent the deceased to San Antonio in December. From the time he arrived in San Antonio in December until he went to Owensboro on the trip he remained in San Antonio. He went to Owensboro and stayed 6 weeks, but at that time he was still making San Antonio his home. He never moved back to Owensboro because we liked San Antonio. It is not a fact that we moved to San Antonio on account of my husband's health and because we couldn't live in Owensboro as he was a consumptive; but he had improved so rapidly in San Antonio. We moved to San Antonio because we liked the place so well. After my husband came here he had a doctor here, but not

for consumption. He had a doctor for a slight lung trouble. Doctor Dougherty treated my husband for the slight lung trouble. I do not know that my husband was a sick man, sick with consumption all the time and that he came down to San Antonio to get restored to health, but he never had consumption. He did come to San Antonio to make it his home; but he came on account of that lung trouble. From August, 1911, up to the time he died, the deceased did not work and drew no salary except during the six weeks he spent in Owensboro, Kentucky. He did not stay in Owensboro because his family was in San Antonio, where we had already moved. My husband was employed at Owensboro for eleven years by the Kentucky Electric Company, and that company asked him to come back and break in a new man. It is true that if my husband had been able to live in Kentucky he could have gotten employment by the Kentucky Electric Company; but he could not live there because his health was run down and the doctors told him he had a slight lung trouble. The Kentucky Electric Company paid my husband $150.00 per month. I know that because he told me; and that is the only way I know it. They had been paying him that salary ever since he took charge of the lamp factory, four years previous to his leaving there. My husband would have been 50 in April following his death, or, in other words he would have been 50 years old on April 22nd, 1913. He was a little more than 49 when he died. I do not know by what route I came to San Antonio, except that the only change I made at St. Louis. I do not know anything about why my husband bought a ticket to Nashville when he returned to Owensboro. I do not know anything about his trip

at all, or why he went to Nashville, as I was not with him. My husband carried some insurance, which has been paid him. My oldest son is 22 years old. He was 22 years old in September. I have no other children 21 years old. My next oldest child is 16 years old. I have no married daughters.

RE-DIRECT EXAMINATION.

My husband carried $1650.00 insurance in the Ben Hurs. My oldest boy earns $8.00 per week, and my next boy earns $7.00 per week. I have no other children working but those two. I have what my two boys earn and my insurance to live on, and have also a small amount in the bank outside of the insurance. The amount in the bank is now about $400.00. My husband had looked around trying to secure work before he died.

RE-CROSS EXAMINATION.

The Ben Hurs, in which my husband carried insurance, is a lodge.

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Rosa L. Powers, a witness for the Plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is Rosa L. Powers. I reside in San Antonio, Texas. I was on the train at Texarkana on the 10th day of August, 1912. I got on that train at St. Louis, and I arrived at Longview on that train

in the month of August 10th. I was going through to San Antonio. When we arrived at Longview it was raining and stormy. It was raining hard. I don't remember the condition of the weather at Marshall. We arrived at Longview at 8:30 in the morning. I don't remember what time the train arrived in Texarkana, but it was at night. I knew James T. Bigger, deceased. I saw him on the train in question. He was sitting across the aisle from me. We were in a chair car. I first noticed Mr. Bigger when he entered the car at Little Rock, and he rode in that car until he got to Longview. There was no announcement made in that car at Texarkana with reference to changing cars to go to San Antonio. I heard no such announcement. No one at Texarkana asked me where I was going, and no one there told me to change into another car. Neither did I hear anybody ask Mr. Bigger where he was going. I noticed the condition of the weather along the railroad between Marshall and Longview. It was raining hard, and the tracks looked like they were covered with water. Before I got to Longview I heard no one make the statement that all people going on the I. & G. N. should change cars. My ticket was taken up by a conductor or auditor on the Texas & Pacific train; but I do not remember whether they took up Mr. Bigger's ticket. No statement was made by the conductor or auditor that took up the tickets with reference to changing cars. When we arrived at Longview I was told I would have to get off the train. I was told that by the porter. I told the porter I did not want to get off in all that rain. First a man came through, either the auditor or brakeman and called out that all passengers should change cars for San Antonio, and the word

San Antonio attracted my attention. That was when the train stopped at Longview. When I heard that I said, "I am going to San Antonio," and also said, "Do I have to get out in all this rain?" The auditor or brakeman paid no attention to me, and I looked around and saw the porter immediately behind the auditor or brakeman and I repeated the question, and he replied, "Yes, I guess so." I remember that four passengers got off at Longview, and it seems like there was some more, but I remember four very well. While this was going on Mr. Bigger was standing up by the seat where he had been seated and was talking to this same auditor or brakeman that made the announcement. I do not think I heard anything said by Mr. Bigger at that time, as I did not want to get off in the storm and rain and I did not pay attention to what was said. The porter then carried my two grips out and set them down on the outside of the train, and I then got down and Mr. Bigger followed immediately behind me. When I got off the train was raining hard, just like a cloudburst, and the water was at least three inches deep on the ground, and it came to my ankles. After I got off and got my things together, I managed the best I could. I had an umbrella and the two grips, and I got them all together and walked to this little switch house, which was about three car lengths from the car. Mr. Bigger was behind me and when I got into the little switch house and turned around he was in there too. The porter got back on the car. I asked him if there was a depot and he said, "I don't know." He set my grips down on the ground in the water. I noticed the effect the rain had on Mr. Bigger and his clothes. He was wringing, soaking wet, as wet as he could be. I

knew nothing about the San Antonio car being on the Texas & Pacific train until that time; but I found it out afterwards by the switchman telling me there in the switch house. The reason I noticed Mr. Bigger on the car was because he was helping some ladies on with some small children when he got on the train at Little Rock. That called my attention to Mr. Bigger. That instance would naturally call my attention to him. I also observed him before we got to Longview. He was neatly dressed with a black suit of clothes and appeared to be a man in good health. When our train was ready leaving Longview, he got on the train going to San Antonio. At that time his clothes were still in the wet condition. Our train arrived at Longview at 8:30 in the morning, and we arrived at San Antonio at 11:30 that night. I rode in my wet clothes all the way to San Antonio, and I am sure Mr. Bigger did also. The clothes in my satchel or valise were all wet.

## CROSS EXAMINATION.

I had a leather suit case and a bamboo suit case. They both got wet. I had some shirt waists in the suit cases, but they were wringing wet. The things I had in the suit cases were articles I purchased in St. Louis. I never do check my suit cases because they get all turned up. The articles I had were things bought in St. Louis and I had no wearing apparel at all. I had no change of shoes or stockings. I do not know how fine my shoes were, but they were just strap slippers. I had an umbrella. I had on low quarter shoes about like I am wearing now. I guess any ordinary rain would have wet my feet when I had low quarter shoes on; but this was no ordinary

rain; it was raining just like a cloudburst. I did not get off that train and go right over to the shed. The conductor did not take my grips and take them himself to the shed. I did not get off the train and just walk about 8 feet to the shed, but I walked about three car lengths. I do not know how far it was from the shed to the train I got back on, but it was quite a little distance. They did not put me in the little shed or switch house; but I put myself there. I think that the shed or switch house was more than 8 feet from the I. & G. N. train on which I embarked, but I do not know how much further it was. It was further from the shed than the train I got off of, but I do not remember much about that. The man (porter) told me I would have to get off the train because I said I was going to San Antonio. He said the train I was on did not wait at Longview. He said "This train don't go to San Antonio; you will have to get off if you are going to San Antonio; this train don't go to San Antonio." I did not claim that the porter ordered me off the train or that he was giving me anything else but information. I have sued the I. & G. N. for the same cause of action as is involved in this suit. Mr. Bigger and I are the only two, of the four that got off at Longview, that have sued. I do not know where the other two are. I did not discuss with Mr. Bigger and the others that day the matter of bringing suit. I do not remember how soon afterwards I discussed the matter. I did not discuss it immediately afterwards. Mr. Bigger and I did not confer together about suing, nor did we discuss getting the same attorneys. We did get the same attorneys, however. I do not remember when I determined to do that, but it was some time after this. I did not confer with Mr. Big-

ger that day at all about the matter. I do not remember whether I sat with him while coming to San Antonio. It did not seem so hot that day. I know my clothes were not dry when I arrived at San Antonio. I travelled all that day from early morning until eleven o'clock that night and had not gotten dry, although it was summer time. My stockings had not gotten dry. I do not remember whether my shoes had gotten dry. It is not a fact that I went into the Texas & Pacific car instead of the I. & G. N. car because the Texas & Pacific car was a chair car and the I. & G. N. car was a coach, a chair car being more desirable than a coach. I can read writing just a little bit. The fact I could read the signs would not make any difference. I did not read the signs on the cars. I said the fact that I could read the signs made no difference because the man there would not let you get into any car except what they wanted you to get in. I showed my ticket and told the man I was going to San Antonio, and he not only told me to get into the Texas & Pacific coach but he helped me in. They did tell me, when I showed my ticket, that I could come all the way to San Antonio without change of cars. They told me I had a straight through ticket without change. When I got to the train I made no inquiries and I did not hear Mr. Bigger make inquiries for the I. & G. N. coach. I did not see Mr. Bigger come there. Besides Mr. Bigger I noticed these ladies and children at the train. I do not know what became of them; they got off somewhere. They were still on the train at Texarkana. I cannot remember whether I saw them after I got into the I. & G. N. coach. I remember seeing them at Texarkana. I heard no announcement at all, made by anybody

about changing cars, at Texarkana. I did not hear the brakeman, or porter, or anybody else tell the passengers to change. I do not know that I was listening to find out those things; but I remember some colored sweepers coming in and sweeping out the cars. I do not remember the brakeman who is sitting at the point indicated by counsel. I do not remember his making any announcement. I heard no one make any announcement in Texarkana and all I saw there was the sweepers. I did not hear any announcement made at any other station. I do not remember them calling out for Marshall. I remember the auditor on the train. He testified in my case. I did not hear the auditor announce at Marshall that people going on the I. & G. N. train could transfer at Marshall if they had not already done so at Texarkana. I do not remember hearing the auditor or the conductor or porter announcing for Longview before we got into Longview. I did not hear anyone call out for Longview. I knew we had arrived at Longview when this auditor or brakeman came through. He said "This is Longview Junction." I did not know that Longview Junction was the place to change cars. I did not expect to change cars at all. When I bought my ticket I was told that I could go through without change. When I got to Longview Junction was the first time I heard the auditor or brakeman make the announcement that passengers should change cars. I guess Mr. Bigger heard that announcement. He must have been sitting several seats ahead of me across the aisle. He must have been near the last seat of the car, facing me. I must have been seated about midway of the car. I did not testify on another trial that I was right at the front end of the

car. At least I do not think I did. I always ride in the middle of the car; and Mr. Bigger was several seats in front of me and facing me. When the auditor announced Longview the train was just stopping. When he called out San Antonio I said, "I am going to San Antonio; do I have to get off in all this rain and storm," and he never answered me, but passed on. I then asked the porter the same question, and he said, "If you expect to go to San Antonio you will have to get off this train." I did not offer to pay any fare or show any ticket entitling me to go on further on the Texas & Pacific train; and I did not tell them I wanted to stay on the Texas & Pacific train and go some where else. I knew that the train had to go on. I knew after I was told, that if I intended to go to San Antonio I would have to get off that train. I never heard anybody announce that passengers should change cars to the I. & G. N. car attached to the rear. I do not remember seeing them make up the train at Texarkana. I did not see them cut the cars apart and put in a sleeper at Texarkana. I did not pay any attention to that and it may have occurred and I not remember it. I remember this car, (the car I was in,) standing off to itself when the sweepers came. I started at St. Louis at 9 o'clock in the morning in full day, and I rode all day in going from St. Louis to Texarkana, and I did not see an I. & G. N. coach or know there was one on the train. I did not go out of the coach the whole day. I had my lunch with me; and I never left the coach during the night or day from the time I left St. Louis until we arrived at Longview. I paid attention to some announcements made before we arrived at Longview. I remember announcements at Poplar Bluffs, Missouri, and at De-

Soto and Bismark. I never heard any announcements at Texarkana; but I remember them at Poplar Bluffs and other places before getting to Texarkana, as it was daylight; but I remember what happened at Texarkana.

## RE-DIRECT EXAMINATION.

I was told that the I. & G. N. car for San Antonio had been on the Texas & Pacific train all the time after I had gotten back on the train at Longview. At the time I was out in the rain at Longview and at the time the porter put my grips down in the rain, I did not know there was a car attached to the train going right through to San Antonio. No one told me that such a condition as that existed, but I learned it afterwards. I do not know that the very car I rode to San Antonio in had been attached to the train all the time, but I was told that.

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Dr. E. P. Dougherty, a witness for the Plaintiff, having been duly sworn, testified as follows:

## DIRECT EXAMINATION.

My name is E. P. Dougherty. I am an Osteopath physician of San Antonio, Texas. I have practiced about three years in San Antonio and a little over four years all together. I am not a graduate of a medical school. I have a license in the State of Texas to practice anything I want to,—medicine, surgery or Osteopathy. I knew J. T. Bigger during his life time, and I knew him before August 10th,

1912. I knew Mr. Bigger 15 years ago, although he never came under my care until he came to San Antonio. Mr. Bigger came to my office the latter part of December or the first part of January, 1912 for examination. After hearing a history of his case and making an examination of him I told him what I thought his condition was and advised what he should do. I simply gave him advise as to how he should take care of himself. I thought possibly with conditions here and by taking care of himself he might get all right; and he would come into my office possibly every week and maybe every two or three weeks; and after he had been in San Antonio several months he gained quite a good deal and was getting in good shape for a patient in his condition. Possibly I examined him several times during those several months, and he wanted to know if I thought he could go to work and I told him I did not doubt but what he could, especially if he could get some out-of-door work. When I first saw Mr. Bigger he was in a run-down condition; and I told him if he would get in the outskirts of the city it would be better for him, and I put him on a diet, and he improved very rapidly, as he did just what I told him to do. He slept out-of-doors all the time and he gained about 30 pounds in three months and he gained more weight off and on until he went back to Owensboro. When he went back to Owensboro his condition was very good and he was able to go to work. I saw Mr. Bigger about the third or fourth day after his return from Owensboro, I think. He was in a very bad shape; in fact, he was in my office and I told him he had better go home and go to bed and stay there. When he was in my office he had a very high fever and was coughing and complain-

ing of his lungs being very sore, and he had a sort of pleurisy. He went ahead and told me about what had happened to him, and I advised him to go home and go to bed; and I think possibly two or three times after that he was in my office. He was brought up in a buggy and several times after this I saw him at his residence. He continued to decline, and was hardly able to get around to do anything from the time he was in my office, but he began to go right down. After his return from Owensboro, his condition was due to exposure and getting wet in the rains. He had pleurisy and a very bad cough and I do not think there was any doubt but that was from getting wet. He also had the temperature which goes with that condition. The exposure had possibly, as physicians say, lighted up the trouble. After his return he simply declined from then on down. I do not remember how long he lived afterwards, but he was never able to get up and down after that. He is now dead. I am qualified to answer the question as to what his condition was after August 10, 1912. In my opinion he had developed tuberculosis, or in other words it had been lighted up and started anew. I do not think there was any doubt but what he had tuberculosis. As to whether in a case where there is a slight tubercular trouble and a man takes proper care of himself he will get well, I will say that the condition can be entirely walled off and he will probably live out his allotted time, especially in a climate like the climate in San Antonio, and he takes good care of himself. Tubercular patients should, of course, take the best care of themselves and any exposure will help develop such an infection and to lower the resistence of the patient.

## CROSS EXAMINATION.

I am a graduate of an Osteopathic school. Such schools are on the same footing as other medical schools. In the State of Texas I can do anything I want to. I took the examination before a board composed of 9 Alleopaths and two Osteopaths. The difference between the medical schools and the Osteopathic schools is that in the medical schools they teach the subject of Materia medica and in the Osteopathic schools they teach the subject of Osteopathic mechanics; and every other subject is the same. In the Osteopathic treatment no medicine is given at all and we prescribe nothing. In straight Osteopathy everything is done by manipulation or rubbing. However, if I see a patient is suffering I prescribe a hypodermic or strychnine; and I sometimes give opiates or laxatives. No good man gives anything to consumptives, because science teaches that anything like drugs will do no good. I would not say they cannot cure consumptives, as there are lots of them cured. I cure consumptives with good advice; I never use any manipulation at all. The statement that the way I practice on consumptives is to give them advice and no medicines is exactly right. But it is not true that after awhile an Allopath gives them no advice but gives them medicine. He does not give them drugs, but gives them advice if he is a good man. The Allopath gives advice like I do if he is a good man. I determine that a man has lung trouble by symptoms, such as increased vocal fremitus, rales, hemorraghes, temperature, and by miscroscopic examination. I take the temperature by placing a thermometer under the patient's tongue. I use a thermometer and have one in my

pocket now. I used a thermometer on J. T. Bigger and found he had fever. I could not say just how much he had, but possibly 104 or 105 when he came to see me on both occasions. He was walking around with temperature of 104 or 105 and was still alive. I am positive of that. That was when he came to my office three or four days after his exposure to the rain. I kept no record of his temperature at that time. In answer to the question if I know how many people had temperature in my office that day I will say we generally go by a history of tubercular condition. I come in contact with lots of consumptives. I am not advertising that line as a speciality as I do not advertise at all. I am not seeking that kind of business; but if they come into my office I make an examination and advise them. Most of my treatment is not advice. Most of my treatment is to tell them the proper way to live. My treatment for tuberculosis is rest 24 hours out of a day, sleeping out of doors, nutritious food, composed of eggs in any way, milk, etc., and by taking care of themselves and building up the system; and if the patient has a chance to get well he does not have to have drugs. I treated the deceased before he went to Owensboro as his physician. At that time he was tubercular. As a tubercular patient he came to San Antonio to get well. I knew him in Owensboro; but I did not know him as a tubercular, because I had not see him for possibly 4 or 5 years. I knew Mr. Bigger a long time ago. The first time I knew he was tubercular was when he came into my office. We were not especially good friends. I nor some of my relatives did not treat him in Owensboro. There is no Dr. Dougherty in Owensboro. There is a Mr. Dougherty; but he is

neither an Osteopath or an Allopath. I knew Mr. Bigger years ago, and when he came to San Antonio sick I suppose he found out I was here and came to my office. I examined him and told him what he should do and he would then come to my office maybe one week and then I would not see him for two weeks. I suppose I was the only doctor he had. I do not know whether Dr. Jackson treated him, nor whether Dr. Wolf treated him, though I heard they did afterwards. I also treated Mr. Bigger after he came back from Owensboro. I did not see Mr. Bigger weighed, but he told me he had gained 30 pounds and I also knew it from the way he looked. When I swore he gained 30 pounds I was stating what the dead man told me and also from his looks I believed what he said. From his looks I would testify he did gain 30 pounds. Mr. Bigger was possibly a little taller than I am,—possibly 5 feet 8 inches or 5 feet 9 inches. He was not a big man. I wouldn't call him an unusually big man. I made a thorough examination of the deceased's lung condition. I took him in my private office and stripped him to the waist and went over him by concussion and with a stethoscope and asked his as to the history of his previous condition. As to how long he had his trouble was ascertained from him; no one can tell how long a patient has had such a trouble. If the disease has progressed for several years and is in the last stages a doctor can tell how long the patient has had it; but if it is in the early stage it is mighty hard to say whether he has had it six months or nine months. If a man came to my office with tuberculosis, with a fever of 104 to 105, I would say he had gotten it, not within the last few weeks, but within a short time. Tuberculo-

sis is a disease which a patient can have in its incipient stages and not have much temperature, but when it reaches what is called the last division the temperature will run up to 104 or 105. I did not use a slide and make a microscopic examination as I had his word. It was not necessary to make a microscopic examination under the conditions. I did not say Mr. Bigger had been sick only two or three days. I said I knew he was already tubercular. I knew he had tuberculosis before, and when he came to see me after his return from Owensboro I knew his exposure had possibly lighted up his condition. He had possibly had tuberculosis before the exposure and had possibly gotten well. When he left here for Kentucky, he looked like a well man and he was in good shape and I advised him to go to work, and when he came into my office he had gained in the neighborhood of 30 or 35 pounds. He had gotten over that condition. After his return he had fever of 104 or 105 and after he had gotten wet, that would indicate that he had lowered his resistance by exposure. As everybody knows the germ is always in our mouth, and the deceased's exposure had lowered his resistance and had allowed the germ to light up the former condition. That was a new germ. If the deceased was a well man when he left, as I say he was, and he got wet on the train and came to my office four days after getting wet and had fever 104, I would say that the getting wet gave him consumption. He had consumption from no other cause than exposure and remaining in his wet clothing. I say that the deceased took consumption and died from getting wet and being exposed, and that that exposure caused consumption which he did not have at that time. A man can de-

velop consumption within six weeks. The condition I determined the deceased was in was not evidence that he had had it some three to five months. It is not true that he could not have developed his condition in a less period than three to five months. As to whether if an Allopathic doctor says that he could not have developed it in less than three to five months he does not know his business, I will say I could not speak for an Allopath. I know Mr. Hilzer, the gentleman pointed out to me. He did not call at my office and state he was a claim agent under Mr. W. L. Chew. He came into my office, but he did not state he was a claim agent for the I. & G. N. He came into my office and said he was a claim agent for the Texas & Pacific. He asked me to state to him the result of my investigation and the knowledge I had of the deceased. That he was making an investigation and wanted to know what I knew about the matter is not the question he put to me. I refused to make any statement to him at all. I told him I had talked to Mr. Carter previously. Mr. Carter was in my office two or three times, but I did not refuse to make a statement to him, but I gave him some advice. I did not advise Mr. Carter to sue.

## RE-DIRECT EXAMINATION.

The claim agent came into my office and introduced himself and said he understood I was a witness for the I. & G. N. railroad in this case. I kind of looked at him half way and he went ahead and stated, "Now, whatever you say, Doctor, make it out and it will be settled for." I told him if he wanted me to make any statement to go call Mr. Carter and Mr.

Fellbaum and that I would make a statement; and he sat there three or four hours trying to get me to make a statement; but I told him I would not make it unless Mr. Carter or Mr. Fellbaum was there. He said at that time that he understood I was a witness for the railroad, and that my bill would be paid; but I was not a witness for the I. & G. N. or any other railroad for that matter. The Osteopathic school of which I am a graduate is on the same footing as any other medical college. There is no difference in its teaching at all. The same subjects are taught in every one of them; and in the State of Texas we (Osteopaths) take the same examination, under a prejudiced board, consisting of 9 Allopaths and 2 Osteopaths and we must make a general average of 75 and not below 60 in any one subject; and under the present system I guarantee that we would not pass if we did not know our subjects. I took the examination with 146 medical men; and the certificate in my office allows me to practice medicine and surgery, and is the recognized certificate in this State. Previous to the time Mr. Bigger called on me at my office I had known him in Owensboro before I left there. When I left Owensboro Mr. Bigger was in good condition, working all the time. He seemed to be a strong healthy man. He worked for the Kentucky Electric Company and I knew him to speak to him. I did not know Mr. Bigger was even sick until he came to my office. I examined Mr. Bigger carefully. He had temperature them. I do not remember just how much, but it was in the neighborhood of 103 or 4 or 5. That was when he first came down here. I gave him advice and the proper treatment for tuberculosis. The result of that treatment was he progressed very rap-

idly. He gave me a history of having had typhoid fever and of having had a microscopic examination. His tubercular condition was not in advanced stage at the time he first came to San Antonio. His left lung was involved, but his right lung was not. The tubercular condition was only in the upper area of his left lung. It was only in the upper lobe of his left lung and the lower lobe was not involved in the least. A patient in that condition, with proper treatment has a good chance to recover in this climate, with good diet and proper advice, before the disease goes too far. After he came here he continued to improve. Before he left he had no temperature at all, and that is the reason I advised him to go to work. I do not know how long he was here before he had no temperature. He came to my office very irregularly. He would come in one day and would have no temperature at all and it would be possibly two weeks before he would come again. I considered him in a fair way to recover under proper conditions, but that it would take proper conditions to do it. He came to see me after his return from Owensboro with a history of having gone through this storm. At that time I found that this same lung was very much involved; and he had pleurisy and he was running a high fever and was in a sick, weak, run-down condition; and that is when I advised him to go home and go to bed; and, as I said, he gave me a history of having been put out in the rain and getting his shoes wet and having to keep on his shoes. If a man is once infected with tubercular trouble and he gets well he can light up the condition in 24 hours time, and he can run a pleurisy, and can run a high fever and will be in a weak condition in a very short time. The fact that a party

has once been a victim of tuberculosis, though he has gotten well, makes him more susceptible to a recurrence of it after exposure; and he should always take care of himself and never expose himself in any way.

RE-CROSS EXAMINATION.

When the claim agent called on me he asked me for statements; but I do not know even what they were. When I refused to give a statement unless the plaintiff's lawyers were present I was only playing fair. It is not true I had to have the lawyers present before I would make a statement, but I thought it was best, as there was a representative of the railroad there. I did not refuse to give him a statement because I wanted to have the lawyers there and hold court as it were, because I did not have time to hold court.

Q. You didn't want to make any honest statement about it unless—

A. Well, I couldn't be bribed at all.

Q. Nobody wanted to bribe you?

A. Well, it looked very much that way.

Q. Well, you are a little suspicious, aren't you?

A. Uh huh.

RE-DIRECT EXAMINATION.

Under the ethics of my profession I have no right to state the condition of a private patient without the consent of that patient or of his representative.

RE-CROSS EXAMINATION.

I did not put it on the ground of ethics because the patient was dead and I couldn't get his consent.

Thereupon the Plaintiff, by his counsel, announced that he closed his case.

W. P. Dehne, having been called on behalf of the Defendant, was duly sworn and testified as follows:

DIRECT EXAMINATION.

My name is W. P. Dehne. I am a brakeman on the Texas & Pacific railroad. I remember being on the Texas & Pacific train on the 9th or 10th or 11th of August, 1912 at Longview. I was a passenger brakeman coming into Longview Junction at that time. At Longview there are two sleepers and a coach taken from the Texas & Pacific train and delivered to the I. & G. N. At Longview I have charge of those two sleepers and the I. & G. N. coach. If I have any passengers to get off there I get them off and then remove my markers and put them on the rear sleeper on the El Paso part of the train, or the last car of the El Paso end of the train. Upon the occasion in question I went back and removed my markers as stated and put them on the back end of the El Paso part of the train. I do not know anything about announcements being made by the conductor, auditor, brakeman or porter except in my end of the tran. I make announcements only in my end of the train and I do not go up into the El Paso chair car or the Fort Worth and Dallas chair cars. I remain in the rear end from the I. & G. N. coach back, and make announcement for passengers to get off at Longview Junction and Longview city myself. The I. & G. N. coach comes from St. Louis. It is a regular coach or chair car. We had only one I. & G. N. coach on the occasion mentioned and that came from St. Louis. At Texarkana there was a sleeper

put in between the chair car and the coach. I did not go through the sleeper into the Texas & Pacific chair car. The I. & G. N. car was switched immediately upon its arrival at Longview. The switch engine was ready to take hold of it when we stopped; and I hardly had time to take off my markers. The I. & G. N. coach was pulled back and shoved down the I. & G. N. track to the place the I. & G. N. train pulls out from. As near as I can remember the I. & G. N. track is about 10 or 12 feet from the switch shed or shanty. It is about 10 or 12 feet from where the I. & G. N. coach would stop. One would have to walk about 3 or 4 steps only from the coach to the shanty. The car shanty in question had a door on one side facing the T. & P. track and the I. & G. N. track runs to the back of it and there is no door on the side facing the I. & G. N. track. To get to the I. & G. N. track one would have to go through the door facing the Texas & Pacific track. There were other depot buildings there. They were the switchmen's shanty, the yard office, the telegraph office and the depot building. The distance between the point where the Texas & Pacific train stops and the point where the I. & G. N. train starts would not be more than 25 feet. The depot buildings and sheds were between the two tracks. There were floors to the buildings mentioned, and the floors were above the ground. Where the Texas & Pacific train stops it is paved with gravel and cinders and such as that and it affords very good walking. I do not remember Mr. Bigger or Mrs. Powers getting off at Longview Junction on the date mentioned. On the day in question we had just been having some very heavy rains and at Marshall it rained very hard; and it had been raining up to the time we reached Longview but there the rain had

ceased. The rain had held up some there. I got off the train but I did not get wet. I walked around in the yards there. I did not get wet in the yards on that occasion; but after we left the yards I did. Before the Texas & Pacific train pulled out I did not get wet. We were out in the yards fully 20 or 25 minutes, during which time I was out on the ground, watching my train, looking after my car and testing the air and hose and heat and placing the markers, and seeing that the car men tested the air before they got through. During all that time I was outside of the train.

CROSS EXAMINATION.

As well as I remember the Texas & Pacific train remained at Longview 25 minutes, or maybe 30 minutes. I did not testify at another time we remained there 50 minutes. I am positive I did not testify that on the trial in another court. I stated that the switch shanty was 8 feet from the I. & G. N. track and about that distance from the Texas & Pacific track. Therefore if the car had stopped right opposite the switch shanty it would have been only 8 feet from the shanty. The car would have to go back 200 feet on the main track from the shanty to get on the switch track. The T. & P. car did not stop North of the switch track. I know that because I was there and saw it. I was not at Longview on the 11th of August. I am positive of that because I was on another train on that date. I was not there on the 13th of August. I do not swear that the Texas & Pacific car stopped right opposite the switch shanty on the 13th of August, because I was on Train No. 5 on the 13th. If I were on the train in question on any other date I would swear to

where it stopped. I would not say the T. & P. car stopped within 8 feet of the shanty on this occasion because I am not there; but I will say where it stopped when I am on that train. My duties do not require me to be with the last three cars on the train after I get to Longview Junction. After I found out there were no passengers to get off of that coach then I go to the rear end of the train. By "that coach" I am referring to the I. & G. N. coach. In other words it is my duty to see that all passengers going to Texas & Pacific points are properly removed to the Texas & Pacific coach. I have never left a Texas & Pacific passenger on the I. & G. N. coach yet. The car that comes through from St. Louis to San Antonio is known as the I. & G. N. car. It is not always marked on the outside with the initials, "I. & G. N., for the simple reason that some times a Texas & Pacific car is used when they are short of I. & G. N. cars. That is not frequently done, but it is done on occasions. They also use Missouri Pacific cars occasionally but not frequently. But the train crew understands or knows which one of those cars are destined for I. & G. N. points, and the train crew so notifies the passengers. The passengers cannot know which is the I. & G. N. car under those circumstances unless the train crew notifies them. I testified in Judge Minor's court the other day and I presume the stenographer took down what I said, and I swore to all I knew about these matters. At that time I said it was not raining at Longview as well as I remember. I am positive that it had ceased to rain; and I believe if my testimony was reported correctly I so stated in Judge Minor's court that it was not raining. I am not positive though because I made no notation of it; but I am pretty positive I swore it was not raining. I did

not swear that the coach on which these passengers arrived at Longview Junction was 8 feet from the shanty in Judge Minor's court; but I said I did not have anything to do with those passengers. I am swearing to the same thing here. I did say something about the shanty in the other trial, but I did not swear that the car in question was within 8 feet of the shanty, for the simple reason I was not questioned on that point. There was a through car on that train from St. Louis to San Antonio; and the passengers on the train were told of that fact before they got to Longview Junction. I will not swear that the passengers were told that because I did not tell them. If I remember rightly they were told that. It would have been an easy matter for the train auditor or porter, instead of having the passengers to get out in the rain, as the testimony shows they did, to have told them to go back through the train to the I. & G. N. car. I did not have on a slicker. I did not get my feet wet. I got a little wet at Marshall but not much. The train stopped at Marshall about 10 minutes. I went from the depot to the train at Marshall. I did not have charge of the train until it got to Marshall. I got wet just a little bit at Marshall. I did not keep dry during that entire trip, but after we left Longview Junction I got wet.

RE-DIRECT EXAMINATION.

It is a fact that after we left Longview Junction we encountered a washout and came back to Longview. The I. & G. N. train had at that time been gone a long time. Since I have been a brakeman I have seen a Missouri Pacific car come down the Texas & Pacific and go over the I. & G. N. as an I. & G. N.

coach goes regularly. That occurred on account of the car, whose place the Missouri Pacific car took, had some defect in it and it was cut out of the train. That was not the case on the occasion in question. Passengers would not know to get into any other coach but the I. & G. N. unless they were told so, and there was nothing to prevent them from seeing the I. &. G. N. coach and getting into it. The Pullman Company raises serious objection to passengers passing through the sleepers at night, and we are instructed not to take them through except in cases of absolute necessity. On the occasion in question the Pullman cars had been placed between the I. & G. N. coach and the Texas & Pacific coach.

H. F. Bodecker, a witness for the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is H. F. Bodecker. I am in the ice and ice cream business at Dallas. I have been in that business for 15 years. I have been engaged in that business since I was auditor on the Texas & Pacific. I am not now in the employ of the Texas & Pacific railroad. I was an auditor for that company in August, 1912. I testified in the Powers case in the State Court. I remember going through the train and taking up the tickets on August 10, 1912; but I do not remember taking up the tickets of Mr. Bigger. It was my duty to take up all tickets.

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Whereupon counsel for Plaintiff stated there was no controversy about the ticket being taken up.

While taking up the tickets after leaving Texarkana I made the announcement that if it was not raining at Marshall that passengers in the Texas & Pacific car for I. & G. N. points should go back to the I. & G. N. coach on account of their not being able to pass through the Pullman in the small hours of the morning as it was against the rules of the railroad company and the Pullman Company to do so. I made that announcement when I lifted the tickets between Texarkana and Atlanta. I made that announcement to every passenger that had an I. & G. N. ticket, that I found in the Texas & Pacific coach. I told them there was an I. & G. N. coach which went through to San Antonio and I notified them to make the change. I did not let them make the change at Marshall because it was raining there. They would have had to get off the train at Marshall to make the change as it was still in the early hours of the morning and people were asleep in the Pullman and they were not allowed to go through the Pullman cars. I stopped them from changing at Marshall because it was raining there. Before reaching Longview I and the porter announced that the passengers could go through the rear of the train to the I. & G. N. car. They were told to go through the sleeper. That was the next morning and the passengers in the sleepers were up. I am positive I did that. Before I got to Longview I took up the tickets and returned a portion to the passengers. I gave them checks at Marshall to indicate who they were, whether Texas & Pacific or I. & G. N. passengers. I gave every one a check that I took tickets from. Some times we do not give them all checks because we can remember them. I do not remember Mr. Bigger on this occasion. In a case of that sort, where I did not know the passenger I give

him a check. I am positive I made the announcement with reference to the I. & G. N. car. I made that announcement between Marshall and Longview Junction and closer to Longview than to Marshall. I made that announcement all through the car. I am positive of that because of the rain at that time. I could not be mistaken about it. The porter was with me and made the announcement right behind me.

CROSS EXAMINATION.

The porter made the same announcement as I did though in a different way. The effect of the porter's announcement was the same as mine. I do not know whether the Iron Mountain, the Texas & Pacific and the International & Great Northern railroads constitute the Missouri Pacific System from St. Louis to San Antonio. I was working for the Texas & Pacific and that is all I do know about who I was working for. I do not know whether I was working on a system known as the Missouri Pacific System. I have seen cars marked Missouri Pacific. There are a great many cars on that line marked Missouri Pacific. I do not know what the conductors and auditors do in St. Louis with reference to assigning the passengers to different cars. I do not look at passengers' tickets until after the train leaves Texarkana. The porters and brakemen are the parties that stand at the entrance of the cars and look at the tickets of the passengers; and at Texarkana they are supposed to go through the train and tell the passengers for I. & G. N. points to go back to the I. & G. N. coach. The coaches that are hauled from St. Louis to San Antonio are not always marked "I. & G. N." I have never seen a car going to St. Louis

to San Antonio marked "Texas & Pacific," and not many of them are marked "Missouri Pacific." They are usually marked "I. & G. N." I do not know how many cars there were in the train in question. I kept a record of the cars in the train, but I have turned that record in. The Company (Texas & Pacific) knows just how many cars there were in the train and also the numbers of them and to whom they belonged. I stated that it was raining at Marshall on the occasion in question. It had been raining rather hard that day, and it is a fact we were turned back by a washout after leaving Longview, and we came back and took breakfast at Longview. We left Texarkana at about 1:10 in the morning and got to Longview at about 8 or 9 o'clock, though I am not positive of that. The Chair car was nearer the engine than the I. & G. N. car, and there were two Pullman cars, or maybe just one, between the I. & G. N. car and the Texas & Pacific chair car. It is against the rules of the Pullman Company to allow passengers to go through the Pullman cars before the guests are up in the Pullmans. I refused to let them go through and told them not to try to do so. And I did not want the passengers to go out in the rain. When we arrived at Longview the cars were in the same position, with the Pullmans between the I. & G. N. and the Texas & Pacific cars. At Longview I saw one lady get off the Texas & Pacific chair car and saw the conductor assist her to the switch shanty. That was the only passenger I saw alight. When she alighted it was not raining very hard if it was raining at all. I do not know what I testified to in the State Court; I am testifying to the best of my recollection now. I stated just now that it may have been raining, but not hard if it was raining at all. I do not know

whether I said anything about "at all" in Judge Minor's court or not. I suppose my recollection at the time I testified in the State Court is as good as it is now. I did not see the conductor run towards "these passengers" when he saw them get off, but I saw him run toward the lady and assist her to the switch shanty. He assisted her possibly 5 or 6 steps. The reason he did not assist any other passengers was because I do not think there were any more passengers there. When the train got to Longview it stopped to allow passengers to alight. In answer to the question as to whether or not it would have been an easy matter for the employes of the Company to conduct the passengers through the one or two sleepers back to the I. & G. N. coach rather than allowing them to get out in the rain, if it was raining, I will say that the employes did do that. I stood between the first car and the Texas & Pacific chair car and assisted several ladies across there myself. Assuming that some pasengers did get out the car and that the porter set their baggage down on the wet ground, it was probably done because the passengers waited so long that the San Antonio car had been cut off of the train and put on another track. The employes of the company are suppose to take the cars from the train as soon as the signal is given that the cars are ready. The passengers are given plenty of time to alight. I do not know whether they are supposed to couple on to the cars until the passengers get off. When I first saw the conductor approaching this lady to assist her he was coming out of the dispatcher's office. I could not say just how far the dispatcher's office is from the shanty, but it is about 15 or 20 steps I suppose. I first saw the conductor when he came out of the dispatcher's office. I do not

remember exactly how he went to the lady, but I think he walked right fast. He had five or six steps to walk after he reached the lady. She had walked possibly 5 or 6 steps before the conductor reached her. He was rushing along to help her with her baggage a distance of five or six steps. That would make it about 14 steps from the place she got out of the car to the shanty. It is true that the conductor was walking from the dispatcher's office to this lady quite rapidly with her baggage in order to assist her only about 14 steps. I saw no particular reason for his helping her. I do not know that he did it because it was raining, though it might have been raining a little. It had been raining in torrents at Marshall. There had been almost a cloudburst in that country. There were about 150 switches in the yard at Longview.

## RE-DIRECT EXAMINATION.

It was as easy a matter for the passengers to transfer by going through the Pullman cars at any time from Texarkana to Longview or even before reaching Texarkana as it was to get off at Longview and transfer, as the I. & G. N. car was attached right behind the Texas & Pacific car up to the time it reached Texarkana, and I gave them ample opportunity to do so. I stood on the platform and assisted some passengers who left the Texas & Pacific car upon my invitation. That occurred between Marshall and Longview Junction. So that there was a transfer of some passengers that I knew of. I do not recollect having any conversations anywhere on the occasion in question. I do not recollect any lady asking me if she had to get off in the rain in going to San Antonio,

as the passengers could get to San Antonio without getting in the rain. I have stated that it was not raining very hard at Longview, but that it had been raining and that it rained afterwards. I did not see the porter take anybody off the train at Longview, though I saw him take some through the train. I can identify the ticket handed me by the punch marks in it.

## RE-CROSS EXAMINATION.

I do not remember exactly when was the first time I heard of this case; but I made a report of it three or four months after it happened. The first time I had the matter called to my attention was three or four months after the happening of the alleged accident. I do not remember specifically having given any notice to the passengers at that time aside from the fact I usually do such things; but the reason the matter was called to my mind so strongly was because we had a washout behind us and one in front of us and we had to stay at Longview all day. I was standing at the end of the El Paso sleeper next to the Texas & Pacific car when the people were leaving it at Longview. The switch engine had not taken charge of the train at that time, when I was assisting these people across. The porter carried the passengers' baggage through and I assisted them. I could see that all the passengers did not leave, and some of them were not supposed to leave. I always give the notice to passengers to change cars and that is the reason I feel I did it in this case. I came down from Dallas as a volunteer witness and the company is paying my expenses and also my salary. My salary is $150.00 per month. For coming down

and testifying in the Powers case I received my expenses and my salary of $150.00 per month for 4 days. I do not remember how much I was paid in all, but I can figure it out. I was given two vouchers for $48.85. That amount included both vouchers. I was here three days and lost a half a day going back. I work on a salary for my father, and he pays me $150.00 per month. He certainly docks my salary during my absence.

RE-DIRECT EXAMINATION

I am getting the same amount for coming down and testifying in this case, that is, at the rate of $150.00 per month. The railroad company does not expect me to come down to San Antonio and pay my own expenses.

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Peter Wyatt, a witness for the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is Peter Wyatt. I was a porter on the Texas & Pacific train on August 10, 1912. I made some announcements to passengers in the Texas & Pacific car who were destined to San Antonio and other I. & G. N. points. I made the announcement after leaving Marshall, at Lansing, about 6 miles before reaching Longview. The usual place for such announcement is anywhere between Marshall and Longview, and when I get to Longview I call it again. Whenever we have the I. & G. N. connection I work the Texas & Pacific chair car until we

get to the connection. I worked in the Texas & Pacific chair car on this occasion. After leaving Marshall, I was instructed by the conductor to go back in the Fort Worth chair car and see if there was any passengers for I. & G. N. points and I always do that. Before reaching Longview I always go back and say, "Longview Junction will be the next station. All passengers for I. & G. N. points will go back through the sleeper to the I. & G. N. coach, change for Houston, Galveston, San Antonio, Austin and Laredo, and don't forget your baggage," and I assists several ladies and several gentlemen with their bags and grips from the Fort Worth chair car, and the train auditor stands in the rear of the Fort Worth chair car and assists the ladies in crossing; and I calls three times, "Longview Junction, change for Houston, Galveston, Austin, San Antonio and Laredo, and don't forget your baggage." I also called again, "Longview Junction, change for Houston, Galveston, Austin, San Antonio, and Laredo and don't forget your baggage," and when the train approaches Longview, I calls again, "Longview Junction, change for Houston, Galveston, Austin, San Antonio, and Laredo and don't forget your baggage," calling three times just like I did at first, and I put my step box down and a lady gets off and a gentleman follows; and after the lady gets off the step box she asked me about the I. & G. N. and I said "where are you going to." and she said, "San Antonio," and I asked her, "Why didn't you transfer?" and she didn't say anything and then the conductor came and assisted the lady to the switch shanty. I remember what occurred that day because I said the same thing at those other places and I am just telling the truth about it. I remember it because I testified

to that in the Powers case. It had rained right smart before we reached Longview Junction, but it had slacked when we arrived there. I made the same announcements over yonder that I am making here. We took the train at Marshall. The regular train was late and this train came as first No. 3 at Marshall and we relieved the crew at that point.

## CROSS EXAMINATION.

I have not kept track of how long it has been since I testified to these matters before and I have forgotten how long it has been. It has not been as long as a year, but I suppose it has been a month. I have testified to the same thing here as I did in the State Court. When I made the announcement the train auditor was standing in the rear of the Fort Worth chair car. I do not know whether he went through the car and made any announcements. I did not hear him if he did. Sometimes he hollas out the announcements but he did not on this occasion. When I got to Longview I said, "Longview Junction and change for Houston, Galveston, San Antonio, Austin and Laredo, and don't forget your baggage." I will swear that is what was holloaed, and that is what I swore to in the State Court, and I am swearing to that now. Before reaching Longview Junction I said, "All passengers can go through the sleepers to the I. & G. N. coach." I make different announcements at different times. I make one kind of announcement at one time and another kind at another time, in order to get them ready so they would be back. I made two different announcements. It was after leaving Lansing that I made the first announcement. Lansing is about 6 miles

from Longveiw Junction, I suppose. I remember Mr. Eskridge the railroad lawyer in the Powers case. I guess I remember the following question being asked me: "Tell the jury just what you did after you left Marshall approaching Longview Junction."

"Well listen to this: (reading) "After leaving Marshall, the conductor gave me instructions to go back and see if we had any passengers for I. & G. N. points,"—you didn't go then until the conductor sent you back?

A. I does that every trip.

Q. You swear to that?

A. Yes, sir.

Q. (reading) "I always does when we have instructions—before reaching Longview Junction, I goes back into the Fort Worth chair car and says, 'Longview Junction,'—that was five miles beyond Lansing, at Lansing—this is what you swore to in the State Court isn't it?

A. Well, four or five miles before reaching Longview.

Q. (reading) "When I first goes back I says," now listen to this—— When I first goes back I says 'Longview Junction will be the next station for I. & G. N. passengers to change to I. & G. N. points?' " Didn't you swear to that in the State Court. Just read that over—can you read?

A. Little bit.

Q. Now read this: "That was five miles beyond Longview, at Lansing, when I first goes back—I says, 'Longview Junction will be the next station for I. & G. N. passengers to change to I. & G. N. points." Now that is the announcement you made at Lansing, isn't it?

A. I notified them before getting to Longview Junction.

Q. Well, you said awhile ago to this jury—you told them about going through at Lansing and making that announcement. Now that is what you swore to in the State Court?

A. After leaving Lansing.

Q. (reading) "When I first goes back," that was done five miles beyond Longview,"—"when I first goes back I says, "Longview Junction will be the next station for I. & G. N. passengers to change to I. & G. N. points," Isn't that what you swore to in the State Court?

A. What I swore to over yonder I swore to the same thing here.

Q. Let's read it all. (shows witness paper).

A. Yes, I see that all right enough, but I said too much.

Q. I will ask you now about your announcement you made at Lansing or near Lansing. Is that correct or will you swear it is wrong?

A. It must be a little different.

Q. It is wrong then. Then you will swear the official reporter got you down wrong, will you?

A. That isn't exactly the way I pronounced it.

Q. Wasn't he sitting up by you at a desk taking it down in shorthand? "Wasn't he sitting down as close as I am to Mr. Cobbs? Don't you remember that man taking down every word you said?

A. I said when leaving Lansing that all passengers should go back in the I. & G. N. coach.

You will swear this is wrong then, will you. Do you swear that is wrong. Will you swear you didn't swear to that in the State Court?

A. The same thing I swear here.

Q. Will you swear you didn't swear to that in the State Court?

A. Must be something wrong.

Q. Must be something wrong?

A. Yes, sir, because I notified the passengers and assisted them back.

When the lady and man got off at Longview Junction they said they were destined for San Antonio. The lady asked me where the I. & G. N. car was and I asked her why she did not go back into the I. & G. N. coach and she did not reply at all, but got off and into the rain. I did not take her baggage and set it down on the ground. I did not hold her parasol over her. I caught her arm and helped her out. She had one grip. The reason I did not take those two passengers back and into the San Antonio coach was because I thought I had them all back. When I ascertained the lady and gentleman wanted to go to San Antonio the I. & G. N. coach had been switched from the train to the side track. As soon as we arrived at Longview Junction the I. & G. N. coach was switched to the I. & G. N. track. The employes have to wait until the passengers get off. As soon as the train had stopped the lady and gentleman came right out very promptly.

Q. And though they came out promptly they had set the car away down in the yard?

A. I never noticed about the rear end.

Q. Well, you just swore they had switched the car down the yard.

A. They had plenty of time to get off before they moved again.

Q. Now, didn't you swear to this jury a moment ago and at the time this lady was alighting in the

rain that—that San Antonio passenger and the gentleman that was with her—

A. Yes, sir.

Q. That at the time they alighted they got off promptly, didn't they?

A. Yes, Sir.

Q. But even then the San Antonio car was detached and off in a different part of the yard.

A. I don't know exactly where the car was at when she got off, as soon as they got out.

Q. Anyway it was detached at the time; it was gone? Wasn't it gone?

A. I don't know exactly whether it was gone or not.

Q. Didn't you swear while ago it was away down the yard?

A. I said as soon as the train arrived, and as soon as they got there they cut the switch.

I don't know whether the car was off or not. I mentioned the fact to the lady that she could have passed through the sleepers into the I. & G. N. coach before they got off; but she did not say anything because she was already off then. The man followed her. They were both in the rain and it was raining a little. The conductor ran back to where the lady was, as he was surprised to see a lady getting off. The conductor was surprised as he thought I had all the passengers back in the I. & G. N. car. I do not know why the conductor was surprised at two passengers fiettin' off the train if he thought I had them all back. After they got off the conductor thought he would assist them back to the little shanty to keep them from getting wet, so he ran back and assisted the lady into the shanty.

## RE-DIRECT EXAMINATION.

I am positive I notified the passengers to get off at Longview. The lady had plenty of opportunity to get off the train after it stopped at Longview before the switching occurred. Passengers often get on the Texas & Pacific car between Marshall and Longview and have plenty of time to get off at Longview. The train stops long enough for passengers destined for Longview to get off there before the switching occurs, either in the rear or in the front of the train. Mr. Bigger and the lady had plenty of time at Longview before the switching was done to have gotten off or have gone back into the I. & G. N. car.

## RE-CROSS EXAMINATION.

I did not swear in the State Court that I did not help the lady at all; but helped a lady off and a gentleman followed. I am positive of that. I have talked to Judge Cobbs (attorney for Defendant) about this case since I testified in the State Court. I have not talked to the claim agent or anyone else about the case since then. The first time I heard about this case was when I made a statement out some time in February, 1913, and I think another statement was made in May, when I received some correspondence from R. C. Anderson, our superintendent. I made two statements. If I am not mistaken one was made the 4th of February and one was made the 3rd of May. The reason I made two statements was because I was requested to do so. They were just alike.

## RE-DIRECT EXAMINATION.

I made out one statement at the request off Mr. Anderson and then made out another at the time Judge Cobbs requested myself and other members of the train crew for a fuller statement.

## RE-CROSS EXAMINATION.

I wouldn't say whether I stated in the State Court that I made out a statement two days after the accident. It may have been two or three days afterwards, or it may have been longer. When I received the correspondence from Mr. Anderson, our superintendent, I made out the statement immediately. I do not mean I made out the statement within two days of the accident, but I made it out several months afterwards.

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R. H. Adkins, a witness for the Defendant, having been duly sworn, testified as follows:

## DIRECT EXAMINATION.

My name is R. H. Adkins. I am the conductor on the Texas & Pacific train from Texarkana to Fort Worth. I remember testifying in the State Court in the Powers case. On August 10, 1912, I was the conductor on the Texas & Pacific passenger train from Texarkana to Fort Worth, known as Train No. 3. I gave instructions for announcements to be made. I gave those instructions to my porter. After we left Marshall, and about 10 miles East of

Longview Junction, I instructed the porter to go back through the Pullman cars and announce that all passengers for I. & G. N. points,—Houston, Galveston, Austin, San Antonio and Laredo, should go back through the sleepers into the I. & G. N. chair car or coach as it was raining and and it would save them from getting wet at Longview Junction. This was a special instruction on this occasion on account of the rain. It is not usual to give such instructions, as we are not allowed to carry passengers through the sleepers except on an occasion of that kind, and on account of the rain I gave those instructions. The porter went back after I had given him those instructions. When we arrived at Longview Junction my porter proceeded to unload the passengers from the chair car; and I went up in the smoker so as to be near the telegraph office. We only had two passengers to unload there. We had no local passengers for Longview, and the only passengers we had for that point were through passengers from St. Louis and Little Rock. As I came back I saw a lady getting on the ground and I ran back and asked her where she was going and she said she was going to San Antonio; and I said "Why didn't you go back through the sleeper and save getting out in this weather." She did not answer my question. I picked up her grips and carried her to what we call the switch shed and then went back and got my orders and mail. I told the lady to wait in the shed a few minutes and the I. & G. N. coach would be cut off the Texas & Pacific train and set opposite the switch shanty and she could then get out of the switch shanty into the I. & G. N. coach and save getting wet. There was a gentleman with the lady, and he followed her into the switch shanty. The gentle-

man could hear what I was telling the lady. They went into the shanty and I left them there. The shanty had a floor to it and was about 12 by 14 feet I guess. Since the case came up I made some measurements at Longview at the request of counsel for Defendant. I have a sketch showing those measurements with me. My train book shows the cars in my train on the day in question. At the request of counsel I have exhibited my drawing to the jury and indicated to them what the different objects were on the drawing. I have placed the train in the drawing in the exact position it was on the day in question and as it was on every day I have noticed it, and have also measured all the distances. The train which I had in charge on August 10, 1912, was made up of Missouri Pacific mail car No. 2129; Missouri Pacific baggage 4115, Texas & Pacific coach 405; Missouri Pacific chair car 8025, Pullman 180, I. & G. N. coach 107, and the three Pullmans behind the I. & G. N. coach which were delivered to the I & G. N. I had no Missouri Pacific coach on that train which went to the I. & G. N. at all. The coaches in the train were all plainly marked. The Texas & Pacific coach was marked very plainly, "Texas & Pacific 405." This train on account of running through to St. Louis, is made up of Missouri Pacific, Texas & Pacific and I. & G. N. equipment, and coming back it is also made up that way. The train runs through from El Paso to St. Louis. The coaches are all marked plainly and distinctly. Coming into Texarkana the Texas and Pacific and the I. & G. N. or the Missouri Pacific and I. & G. N. coaches are coupled together. They are arranged that way at St. Louis. That is on an all day run. I saw the I. & G. N. coach placed opposite

this switch shanty just about the time I got there. I made the sketch exhibited to the jury from data I had in my book. The photographs handed me are perfect pictures of Longview Junction. The first one shows the depot facing North and towards the Texas & Pacific track. The next is a photograph of Longview Junction facing East. There have been no changes made in the buildings there since these photographs were taken, and they are a fair and correct representation of affairs as they are now. The lady would have had to walk about 15 ordinary steps to get to the shed from the place she got off the car. The shed was nearer to the car than the depot, and it was also nearer the car after the I. & G. N. train was made up than the depot. It was really the most convenient place to take the lady for all purposes. It is about 8 ordinary steps from the shed to the I. & G. N. coach. It is the same distance from the Texas & Pacific track to the buildings as from the I. & G. N. track to the buildings. It is between 10 and 12 feet from the track we came in on to the depot and it is about the same distance from all the buildings; and it is about the same distance from the buildings to the track where the I. & G. N. train runs. In other words these buildings were half way between the two tracks. They were sufficient to protect the passengers. The ground there was graded, having a fall of 5 or 6 inches from the Texas & Pacific track to the I. & G. N. track. It was raining but the walking there was good. The platform there was made of sand and gravel.

## CROSS EXAMINATION.

I testified in the State Court. At the time the passengers got off at Longview it was drizzling.

There was no heavy rain there. The first building in the sketch handed me is the depot and the next building is the telegraph office. The telegraph office is about 8 steps from the depot. The depot is about 80 feet long. Next to the telegraph office is the yard master's office. The yard master office is about 8 steps from the telegraph office. Next comes the car inspector's office and then the switch shanty. It is about 8 steps from the yard master's office to the switch shanty. It is about 80 feet or maybe 100 feet from the end of the depot to the switch shanty that the passengers went into. Then the depot is 80 feet long. The switch indicated on the sketch is just West of the depot and the engine always stops at the point indicated on account of the road crossing right in front of the engine. I have indicated the car I was on. I was between the baggage car and the smoker. The cars held the same relative position to the depot on the occasion in question as I have indicated on the sketch. The engine is always run about 40 feet past the depot. On the occasion in question I had two coaches and one chair car besides the sleeper. I had nine cars in my train in all. The first part of the first car came about opposite the depot, and the train extended back from the end of the depot 9 car lengths. A car is about 50 or 60 feet long as a rule, and the longest cars we have are about 72 feet in length. The average car length is 60 feet. The first car in the train was a mail car. The tender is about 20 feet long. The tender in question was a Texas & Pacific tender. The reason I ran to the passengers when they got off at Longview was to protect the lady, as I would run any time to protect a lady, whether my passenger or not. I have

been in Texas 30 years and I have never seen such a rain as we had had. I was about 60 feet from the lady when she got off and I ran to help her as it was my duty to do. I did not know at the time who the lady was. I saw Mrs. Powers in the State Court. I only glanced at her when I ran to her and I could not identify her at all. I think she had two grips. I took both of her grips and the gentleman followed. I do not know who the gentleman was. As to whether the Texas & Pacific, the Iron Mountain and the I. & G. N. constitute a part of the Missouri Pacific system is something I know nothing about. The Missouri Pacific runs through Missouri and up in those parts; but we made no reports whatever to the Missouri Pacific; our reports are made to the Texas & Pacific. The folders we use do not say "Missouri Pacific" and that the Texas & Pacific and I. & G. N. are a part of the Missouri Pacific system. I swear I do not know that to be a fact. It was the duty to have gotten the passengers into the car to which they were to transfer when I gave him instructions. Passengers can go back through the sleepers in the day time. It is not against the rules for passengers to pass through the sleepers unless accompanied by some of the train employes; but the conductor's instructions take superiority over all other instructions and what he instructs is done by his crew. The conductor has full charge of the train and what he instructs his crew it is their duty to do, and I am responsible only to the officers.

## RE-DIRECT EXAMINATION.

There was nothing to prevent passengers from walking through the sleepers in the day time or at night either. We do not keep the doors locked, but

we keep the doors open so that the train crew can pass backwards and forwards.

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P. F. Crutchfield, a witness for the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is P. F. Crutchfield. I am a conductor on the I. & G. N. railroad. The name on the back of the ticket handed me is my name. The ticket has my punch marks on it, but I did not put my name on it. I identify the ticket as one I took up from some party on the train on 10th of August, 1912. I remember something about a big rain we had about the 10th of August, 1912. I remember having a who lot of passengers at that time, but I do not particularly remember Mr. Bigger. I remember that on the date in question I went up there and had two passenger cars leaving Palestine going after Second No. 3. At that time it had been raining awful hard. At the time the Texas & Pacific train arrived at Longview, it was just sprinkling a little bit though it had been raining awful hard, and it had rained what I should call "the bottom dropping out." When the Texas & Pacific train arrived it had been some 10 or 15 minutes since the hard rain. I remember that distinctly. My run is from Palestine to Longview Junction and from Palestine to Mineola. On the date in question I was running from Palestine to Longview. On the date in question there were three Pullman cars on the I. & G. N. for San Antonio and Laredo.

## CROSS EXAMINATION.

I did not take a ladies coat and try to dry it for her on this occasion. I do not remember any of my train crew taking a ladies coat and trying to dry it for her on this occasion. I do not know anything about that.

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Thereupon, there was offered in evidence,, the testimony of Dr. J. B. Lacer, taken by deposition as follows:

## DIRECT INTERROGATORIES.

My name is J. B. Lacer; my occupation, physician; and I have been engaged in that profession for twenty-five years. I knew J. T. Bigger during his life. I knew him at the factory where he was employed. I was there several times, and just knew him or saw him on slight business matters. Mr. Bigger consulted me and had me examine him and tell him what was the matter. I very frankly told him what the trouble was and he dismissed me immediately. I gave him a treatment which lasted about a week. I examined him thoroughly and he asked me to tell him frankly what my opinion was. That was in July or August, 1911, to the best of my knowledge. There was no record made of it. He asked me to tell him what the trouble was and I told him his left lung was "going to the bad," very rapidly. I gave him a prescription in the nature of a tonic to build up his general condition. That was all I treated him for. The occasion mentioned was the last time

I saw Mr. Bigger during his illness. He promised to call in two or three days but did not do so. The only thing I know about his condition is from having seen him at the factory a number of times. I noticed he was thin, and his appearance was far from the appearance of a well man. I really do not know anything about his condition at all. I saw him several times at the factory, and on the occasion when he called at my office, which were the only times I saw him. I do not know where the Biggers lived when they first came to Owensboro. They lived up on East Third street, near Triplett, when I knew him. As to Mr. Bigger's health when I first knew him, I will say I know nothing about that at all from a professional standpoint. All I know is from his appearance. I had known him possibly a year before I examined him. I did not see him at all during the summer of 1912, and did not know he was in Owensboro at that time. I had no conversation with Mr. Bigger at all in regard to his health, for I did not see him at the time he moved to Texas. I heard people say he had gotten fat and well and I said that that was one case of tuberculosis that has been cured by somebody. I do not remember anything about when Mr. Bigger was in Owensboro during the year 1912; and in fact did not know he was here then. I have no record of the weather at that time. I kept a close record of the weather for years until the last eighteen months, including pressure of the barometer, direction of the winds, and thermometer readings, but dropped it about eighteen months ago, I guess. I do not know anything at all about the weather when Mr. Bigger was in Owensboro, and I did not know he was in Owensboro in June, July and August, 1912. I do not know when Mr. Bigger first

moved to Owensboro, or how long he lived there. I do not know when he left for Texas; but think it was sometime late in the fall of 1911. I do not know anything about the condition of his health when he left Owensboro. . I understand he moved to Texas for his health. At least that was the statement that was made. Mr. Bigger was a man that showed every appearance of not being a strong man, or a robust man, or a well man. My only means of knowing whether he was a healthy, robust man or otherwise was by seeing him at the factory where he worked. I never had any business relations with him, and did not know him intimately.

CROSS INTERROGATORIES.

I only treated Mr. Bigger once; and I have not seen him since that time, which was July or August, 1911. Mr. Bigger was working for the Kentucky Electric Company while he was in Owensboro. I do not know what his salary was. I have received no letters from the railroad company or from their representatives.

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Thereupon, there was offered in evidence the testimony of Dr. E. B. McCormick, taken by deposition, as follows:

DIRECT INTERROGATORIES.

My name is E. B. McCormick; I am a physician; and I have been practicing for thirty-two years. I was Mr. Bigger's physician off and on; not regularly all the time; but I did some practice for him for

several years, probably ten years or something like that. I knew him when he first came to Owensboro; and have known him ever since he first lived in Owensboro, which must have been twelve or fifteen years ago. I treated Mr. Bigger once for typhoid fever. That was in July, I think, 1911; and I treated him before that for influenza and grippe. I never treated him for any fever until he had typhoid fever. The last time I treated him was for some lung trouble. In fact he had tuberculosis. I treated him from about July 22nd, up to the 22nd or 28th of August, 1911, at which time he had this lung trouble; I told him he had it and advised him to leave Owensboro. I treated him before he had typhoid fever for influenza, but not since. Following the typhoid fever he had I treated him for this lung trouble. He came to my office off and on for two or three months, and I treated him for his tubercular trouble. Of course, by my treatment of him I knew something of his condition. Up until he took this lung trouble, or up until he took the typhoid fever he was able to work. On my first acquaintance with Mr. Bigger he was boarding on Bolivar street at what is now called the Conyers Boarding House. I think he had lived previous to that in the lower end of town; and I am pretty sure he did, though I do not know where. When I first knew Mr. Bigger he was able to work. I treated his family and I would see him that way; and, of course, once in a while I may have prescribed for him. I saw Mr. Bigger once while he was in Owensboro during the summer of 1912, and I think he lived on East Third street at that time. I remember I advised Mr. Bigger to sleep out of doors, and he did so previous to going to Texas for a while. Then when the weather

was too bad, he slept upstairs with his windows open. He talked to me often about his health, and that was what he consulted me about; and I advised him to leave here, (Owensboro). I know that Mr. Bigger was in Owensboro during the summer of 1912; but I do not remember anything at all about the weather. I never had a talk with him at that time; but I was going up East Third street and he was coming down, walking, and I was in the machine and just spoke to him as he passed. That was the only time I saw him while he was in Owensboro at that time. I do not keep a record of the weather and do not rememember anything about the weather at that time. I do not know when Mr. Bigger first came to Owensboro. He was here about 12 or 15 years I am sure. I think it was in 1911 that I treated him for lung trouble and I think he left for Texas that fall. He went to Colorado or Texas, I do not know which; but he was in both states while he was away. He went away either that fall or early in the spring. When he first came to Owensboro I know he was a laboring man, an electrician; but when he left Owensboro he was not able to work at all. I rather think he went from Owensboro to Colorado; I am not positive about that; but he moved there under my advice, to regain his health. Mr. Bigger was a very unhealthy looking man; he had the appearance of being very unhealthy. I am able to state this because I treated him and advised him to leave Owensboro.

## CROSS INTERROGATORIES.

I knew Mr. Bigger when he first came to Owensboro, which was about 12 or 15 years ago. When he first came to Owensboro he was apparently well and

was able to work. I never saw Mr. Bigger after he left Owensboro in the summer of 1912. I could not state just when was the first time I was notified that the defendants wanted me as a witness in this case. There was a man connected with the railroad company who came here about a month ago, or hardly so long, and consulted me. I have forgotten his name and do not remember who he was. So far as I know, Mr. Bigger, during his life time, was a hardworking, industrious man, and was a kind husband and a devoted father. I have never received any letters from the railroad company or its representatives.

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Thereupon there was offered in evidence the testimony of Dr. J. M. Coffman, taken by deposition, as follows:

DIRECT INTERROGATORIES.

My name is J. M. Coffman; my occupation is that of a physician; and I have been practicing ten years. I did not know Mr. J. T. Bigger personally and I never saw him. My brother, K. W. Coffman, who is at present absent from Owensboro, treated Mr. Bigger a very short time for tuberculosis. We made a diagnosis of his case, the result of which was tuberculosis. I know that my brother treated him for a short time for tuberculosis only. I never saw Mr. Bigger myself and do not know anything about his appearance. I do not know where the Biggers lived or boarded when they first came to Owensboro. I do know that they lived on East Third street for a while. I do not know anything about Mr. Bigger's

health. I only know that my brother treated him for tuberculosis. I know very little about Mr. Bigger. I never talked to Mr. Bigger myself. I remember that the summer of 1912 was a very rainy summer, but I do not know that Mr. Bigger was here during that time. I haven't any line on him after my brother treated him in 1911. I do not know at all about when Mr. Bigger first came to Owensboro, or how long he lived here, or when he left for Texas; I only know he moved to Texas for his health, because he had tuberculosis. I never saw Mr. Bigger myself and could not state anything about his appearance as to health.

CROSS INTERROGATORIES.

I never treated Mr. Bigger at all. My brother treated him a very short time and talked to me about him, and we made a diagnosis of his case. I could not state anything about who Mr. Bigger was working for while in Owensboro, as I did not know the man. I have never received any letters from the railroad company or any of its representatives.

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Thereupon there was introduced in evidence the testimony of Henry Berry, taken by deposition, as follows:

DIRECT INTERROGATORIES.

My name is Henry S. Berry; age 49; occupation, farmer by profession, and have been engaged in farming all my life. I knew Mr. J. T. Bigger dur-

ing his life time, slightly through my brother-in-law, J. W. Dougherty, who was a grocerman. Mr. Bigger traded at his store, and I only had a slight speaking acquaintance with him. I am not a physician, and of course never treated Mr. Bigger. It has been about seven years since I saw Mr. Bigger and I know practically nothing of his condition. Mr. Bigger lived somewhere near the courthouse square when he first came to Owensboro, but I do not remember just where. I really do not know anything at all about his health. He was a man who seemed to be in apparently good health when I knew him. It has been about seven years since I saw him; and I did not see him during the summer of 1912. I have had no conversations at all with him about his health. I am Special Weather Observer at Owensboro for the Government and keep the Government records; and will state that the summer of 1912 was very wet, and I file herewith a copy of my report for the months of June, July and August 1912, showing the rainfall in inches during those months. (See Exhibits A, B and C attached hereto). I could not state, however, whether Mr. Bigger was here during those months or not. I did not have any occasion to know he was in Owensboro, except as I read it in the papers. I could not state when Mr. Bigger first came to Owensboro, how long he lived in Owensboro, when he left for Texas, or anything about the condition of his health. I can only state about Mr. Bigger's appearance by seeing him at my brother-in-law's store. He had a pallid face, light color, which is incidental to a man working indoors.

## CROSS INTERROGATORIES.

I am a farmer and reside just outside the city limits of Owensboro. I saw Mr. Bigger, during the time I knew him, about ten or twelve times a year. I could not state where Mr. Bigger worked during the time he was here; and I have no way of knowing that at all. I have never received any letters from the railroad company or its representatives.

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Thereupon there was introduced in evidence the testimony of J. W. Dougherty, taken by deposition, as follows:

## DIRECT INTERROGATORIES.

My name is J. W. Dougherty; I am engaged in the wholesale whiskey business; and have been so engaged for the past two years. I knew Mr. Bigger in his life time; and knew him, I guess, eighteen or twenty years. I first knew him when he came to Owensboro and was in the shooting gallery business; and after I became acquainted with him we got to be great friends, and I finally went into the grocery business and he did all of his trading with me during all the time he was in Owensboro. I am not a physician and therefore gave him no treatments. I do not remember what month it was I last saw Mr. Bigger, as I did not keep up with it. I saw him just the night before he left here, whatever month it was he left Owensboro. Up until three months before he left Owensboro he was in good health; and about three months before he left Owensboro he took sick,

and was up and down all the time for about three months before he left; but he was never bedfast. As well as I remember Mr. Bigger lived on West Main street in Owensboro, Kentucky, when he first moved to Owensboro. When I first knew Mr. Bigger his health was always good. I do not know of a spell of sickness he had at all until just a few months before he left Owensboro. He was here during the summer of 1912, and I saw him then, at which time he boarded at the Bell Hotel. When he came to Owensboro in 1912, I met him on East Fourth street, which was the first I knew about his being in Owensboro. I asked him to get in the carriage with me and ride down the street. It was Sunday and I wanted to take him home to dinner; but he said he would go around to the Bell Hotel, as he believed he would rather go there. I asked him how he was getting along and he said he was very well; said he had gained, I think, something like twenty-seven pounds since he had been gone. I wanted to know what in the world he was doing back here, and he told me then that he had come back to break in a new man at the Kentucky Electric Company; that they had sent for him. I drove him around to the hotel and we sat there and talked a good deal; and I asked him about his family; and he said they were all well pleased and were doing nicely; that he had not gone to work but had several opportunities to work, but did not feel strong enough and did not think that he would go to work until later in the summer, or maybe in the fall. I really do not remember much about the weather during the year 1912; but I think possibly it was rather a rainy month he was in Owensboro. I know that the day I met him on Fourth street the morning was pretty, a nice bright morn-

ing, and that afternoon I know it rained very hard, because we had started to my mother's-in-law, and we got caught in the rain and I had invited Mr. Bigger to go down with me, and the reason it strikes me so forcibly was that afternoon I made the remark that I was glad Mr. Bigger did not go because it rained so hard. I do not remember what month it was he was in Owensboro. I haven't a positive recollection what month it was, but I think it was in March, 1912. I cannot state just when Mr. Bigger moved to Owensboro; but I think it was between eighteen and twenty years ago. When he first came to Owensboro he opened up a shooting gallery, and I was working for a grocery and was very fond of rifle shooting and I visited his place considerably. When I first knew him he was in fairly good health. That is, he was in fairly good health, as I stated awhile ago, up until about three months before he left Owensboro, when he left on account of his health. He was in very bad health when he left Owensboro. Up until about three months before he left for Texas he looked very robust and healthy. He never did have any serious sickness that I knew of up until that time.

## CROSS INTERROGATORIES.

I have known Mr. Bigger's family longer than twelve years. During the time I knew Mr. Bigger he was a hard working, industrious and honest man, devoted to his family, and made a good husband and father. Mr. Bigger bought groceries from me longer than twelve years; rather not directly from me, as I was not in the grocery business by myself all the time; but he bought groceries from my brother-in-law and myself. I remember while Mr.

Bigger was in Texas that Mrs. Bigger one Sunday afternoon showed me a picture of Mr. Bigger and at that time he had been gone possibly thirty or sixty days. Mr. Bigger did not return to Owensboro after his family. When he was in Owensboro in 1912 his family were in Texas. I did not have any conversation with Mrs. Bigger in 1912, and did not see her at all in 1912, and therefore did not state to Mr. Bigger in her presence that he looked perfectly well. I have never received any letters from the railroad company or its representatives.

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Thereupon there was offered in evidence the testimony of Dr. K. W. Coffman, taken by deposition, as follows:

## DIRECT INTERROGATORIES.

My name is K. W. Coffman; I am a physician, and have been engaged as such for fifteen years. I saw Mr. J. T. Bigger professionally in July, 1911, but had known him quite a while prior to that time. I saw him on the 17th, 18th, 19th, 20th and 22nd of July, 1911, in making professional visits to his home. I treated Mr. Bigger on the dates mentioned at his home. I only treated him five days, and he was suffering from tuberculosis. I made a diagnosis of his case during the time I treated him, both physical and microscopic examination, the result of which was tuberculosis. I did examine Mr. Bigger and I found that he was in the third stage of tuberculosis. Mr. Bigger asked me about changing climates, but I never told him it was necessary because he was in the third stage and I knew he was in a very bad condi-

tion. The last time I saw Mr. Bigger before he left Owensboro was on the 22nd of July, 1911, at which time he presented a tubercular appearance. When he was in Owensboro in 1912, I saw him on the street one day, but I do not remember that any conversation was had at all; and I do not remember anything that was said. I do not know when Mr. Bigger first moved to Owensboro and I do not know anything about the condition of his health when he moved to Owensboro. The first time I knew him or saw him he was suffering from tuberculosis; and when he left Owensboro in search of a more desirable climate he was in the third stage of tuberculosis.

CROSS INTERROGATORY.

I am a graduate from the Osteopathic and Medical school. My practice has been general and not limited to a certan line. I do not know whether it is a fact that during the time that J. T. Bigger resided at Owensboro he was a very active man and lost little, if any time from his labors, as I know nothing about his personal affairs. I do not know whether Mr. Bigger worked when he was in Owensboro in 1912 or not, and therefore do not know whether it is true that during the summer of 1912 he was employed by the Kentucky Electric Company at a good salary and was able during that time to do hard physical labor. I only saw him on the street one day at that time. I did not state to any one that I had never seen Mr. Bigger look so well as when he was here in 1912; nor did I hear any one state anything to that effect. I think it is a fact that during the time I knew Mr. Bigger he was a hard working, sober and industrious man. I never heard anything to the contrary that Mr. Bigger was a kind husband and

devoted father and a highly respected citizen during all the time I knew him at Owensboro. When the officer before whom I am giving my deposition called and told me she wanted to take my deposition was the first time I learned I was to be a witness in this case; and she is the first party that talked to me about the matter. I have never received any letters or telegrams from the railroad company in regard to this case. I am giving my deposition before Lillie M. Moore, a Notary Public in and for Daviess County, Kentucky, and there is no one present but Miss Moore and myself.

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Dr. L. B. Jackson, a witness for the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is L. B. Jackson. I am a graduate of the University of Texas, Medical Department. I knew J. T. Bigger in his life time. I was called in to treat him and I made an examination of his condition. I did that about September 9th, 1912, I found him very weak and very wasted. Had quite a good deal of temperature. His temperature was something like 101 or 102, considerably above normal and he was coughing and had considerable trouble with his bowels and had diarrhea. I examined his chest and found the signs of a cavity in his lung on the right side, as I remember; and he had tenderness about over his abdomen. I saw him at that time on the 9th, 11th, 13th and 20th of September and then did not see him again until the 31st of October, 1912. From my examination of the deceased

I was able to tell what was the matter with him. I made a diagnosis of pulmonary tuberculosis and intestinal tuberculosis. The intestinal tuberculosis was secondary or followed the pulmonary tuberculosis out of the lungs. My diagnosis in his case was that he had tuberculosis of the lungs first with an infection in the intestines; that is, he had an infection of the intestines at the time I saw him which to my mind produced the diarrhea. The trouble in his lungs, however, occurred first. Tuberculosis is, of course, due to a germ. From my diagnosis I would say that the disease had been going on quite a good while to produce his condition. It takes not less than six months usually to produce the condition he had, and probably it would take from six months to two or three years. The getting wet, which it is claimed occurred on the 10th of August previous, could not produce the trouble he had. I would not attribute his trouble to getting wet on the 10th of August. My reason for that is because the lesion was too far advanced at that time when I saw him. By lesion I mean the lesion in his lungs primarily. The lesion was too far advanced for a month's time. It would take six months time from the primary infection to produce such lesion. The different stages of consumption are rather arbitrary. The stages are supposed to be divided into the first, second and third stage. The third stage means the last stage of tuberculosis. Assuming that the testimony shows that the deceased was examined in July, 1911 and that it was found he was in the third stage of tuberculosis and that he was in bad condition; that he left Owensboro, Kentucky, and came to San Antonio; that he afterwards returned to Owensboro and while he was there it was rainy weather; that he worked

there 6 weeks, I would say that that would have had a tendency to make him worse to go back to the climate or surroundings where he developed the disease. It would have a tendency to develop the disease even where the party is apparently cured. A great many people return to the place where they first took the disease and the disease returns. If the patient has improved he would certainly grow worse when he went back in the course of events; it stands to reason he should. By growing worse, I mean that the disease gets the better of him; and it is always harder to get a man out of it after he has gone back and taken a relapse. The traveling up there and working six weeks and then coming back would have a tendency to make his trouble worse, lowers the resistence and lets the disease get the start of him. The fact that he traveled from Owensboro, Kentucky, to San Antonio in a chair car and did not take a sleeper would have a tendency to pull him down and make his condition worse. The trip back home and facts mentioned in connection with it would certainly have a tendency to shorten the deceased's life. From my diagnosis I would say that tuberculosis was the cause of Mr. Bigger's death. The fact of his getting wet might have lowered his resistence, which, like traveling, has a tendency to lower the resistence. It would be hard to say what effect or tendency it would have had in aiding in his death; but it would be one of the factors in lowering his resistence. However, it would not have produced the infection. The getting wet would not necessarily have produced consumption, as getting wet does not produce consumption. As I have stated before, the getting wet would have lowered his resistence and allowed the

germs which were already present to get in their work. The germs were there already and would have worked anyway; and I guess it was just a question of time when he would have died.

## CROSS EXAMINATION.

I have talked to Mr. H—— about this case. The first time I saw him was some time during last year; I do not remember just what the date was. It was some time after Mr. Bigger's death. He was in my office one time several months ago and he came this morning and asked me to come to court. I have talked to no one else connected with the railroad company about this case. I have never talked to the lawyers about it to my knowledge. I attended Mr. Bigger as his private physician. As to whether I had permission from the deceased or his representative to divulge his condition to a railroad claim agent I will say I had not seen the deceased since October 31, 1912, and the claim agent came to my office some time in 1913. Mr. Bigger himself talked to me about getting wet. The claim agent also told me Mr. Bigger got wet. I came to tell a third party the conditions under which my patient died just like doctors very often do to a man that comes to them and asked them for a statement. I do not think that doctors are under any obligation to keep that a secret when they come in and ask for it.

Q. Then your profession has no such ethics as that?

A. Under conditions of this kind.

Q. What kind?

A. As existed in this particular case.

Q. What exists in this case to differentiate it from any other case?

A. Well, a man comes up and asks me for a statement of Mr. Bigger's condition and I give it to him. I signed a statement dictated by the claim agent. They are to pay me for my services! but I do not know what they are going to pay me. I suppose you could say I made a statement in regard to one of my private clients in consideration of pay, as they asked me for a statement and I made it and they paid me for it. They paid me about the usual fee, $10.00. I told them the physical condition of my patient as I found him. I do not know what I am to get for my further services in this case; but I will probably get something. Those things run from $25.00 to $50.00. I did not ask Mrs. Bigger's consent to make a statement as I did not know where Mrs. Bigger was. I did not know at the time that she has lived in the same place all along. I did not make any inquiries as to where she was. I do not think getting wet would have hurt the deceased nearly so much as his return to Owensboro and going to work there. As to whether it would or not would depend to a certain extent upon the kind of work he did. I know he did inside work there as Mr. Bigger told me. He told me the kind of work he was doing when he went back to break in a new man. He did not tell me also that that was what played the mischief with him. That the third stage in consumption is the last stage is the way the term is usually applied. When a man has the third stage, he is usually emaciated, weak, has a cough, high fever and is not long for this world; but as I said awhile ago those stages are arbitrary. When a man is in the third stage he is practically doomed to die. If, after a man came to San Antonio from Owensboro in December, 1911, and was supposed to have tuberculosis in the third stage, and after com-

ing to San Antonio gained from 30 to 35 pounds, that would certainly show improvement. But such improvement would not necessarily prove conclusively that he did not have tuberculosis in the third degree when he came to San Antonio. I would call that a marked improvement. If after coming here he gained 30 to 35 pounds in weight and apparently looked well and probably weighed more than he ever did in his life, I should certainly think he was getting along fine; but it would be necessary for him to be pretty cautious still. Take a man in this man's condition, after being subject to tuberculosis, after he had made the gain stated, and had no temperature and the doctor had told him he could go back to work and he afterwards received a severe drenching and stayed a part of a day and part of a night in a coach where he was not able to take any exercise at all,—I would expect that to have some influence on his condition; and as I stated awhile ago it would lower his resistence. Then if immediately afterwards he is taken with pleurisy, has high temperature and goes to bed and never gets up again, I would not say the drenching had nothing to do with his condition. I would say it had something to do with his condition. As to whether the drenching had a good deal to do with his condition would depend very largely on other conditions and circumstances that attended the drenching.

Q. Whenever you have once been subject to tuberculosis you must be more careful than ever you may have been to protect yourself against a recurrence of it?

A. Yes; I might modify that statement to this degree that if you get along without any treatment at all——

Q. Well about the only treatment you give is plenty of outdoor exercise and nourishment?

A. Plenty of exercise and good air and nourishment.

There is no specific for tuberculosis; but there is what is called Tuberculine, which has the same effect, to a degree, as vaccine. It helps a man in many cases, in selective cases, but there are a great many doctors that will not touch it. There are very few doctors that administer that serum. It is not a doubtful cure in selective cases. A drenching such as has been described and remaining in wet clothes, would have a very bad effect on a man in the condition of health Mr. Bigger was in. Anything that lowers a man's resistence makes him susceptible to tuberculosis. Typhoid fever lowers a man's resistence, and anything that lowers his resistence makes him a more susceptible subject to tuberculosis. As to whether I would regard a patient in a fair way to live a long time who had had typhoid fever and then developed tubercular lung trouble and left the vicinity where he was living and came to a new country and took good care of himself and gained 30 to 35 pounds, and was pronounced by his physician able to go to work, would depend upon what he did and what happened to him. As to whether, if he went along cautiously, taking good care of himself, I would expect him to live a long time is a pretty hard question to answer. If he takes good care of himself he ought to go ahead and get well. But if he does not continue in the environment under which he gained it would probably go down. A change of environment might, of course, throw him back. A severe wetting or something like that would also throw him back. If the testimony shows that the

deceased went back to Owensboro to break in a new man; that when he was seen on the train a few hours before he was submitted to the drenching he was looking all right; that he was submitted to a severe drenching and from then on he began to decline and died,—I do not believe that the exposure had a great deal to do with producing his death, though, as I said awhile ago the exposure would lower his resistance and that combined with other things would have had something to do with producing his death. I am testifying on the hypothesis that the deceased went back to Owensboro.

RE-DIRECT EXAMINATION.

I went to Mr. Bigger's house and Mrs. Bigger knew I had been her husband's physician; but I do not know whether she knew what I would testify to as she never asked me. I never talked to her lawyers about this case and have never seen her representative nor have I seen Mrs. Bigger since October that I know of. I have never talked to anybody about the facts in the case except Mr. H...., the claim agent. There is nothing unprofessional for a doctor to charge for the use of his time, and they all do it, and I know of no exceptions. All doctors charge for coming to court and testifying, and it is considered professional. I had a right to refuse to give a statement of Mr. Bigger's condition to either side. The only object I had in giving my testimony was that justice might be done. The giving of my testimony would be helping out. I don't know whether the concealing of it would be fraud or not. To conceal my testimony would be to deprive the other party of the benefit of my testimony. I don't know why the plaintiff did not call on me for my testimony.

Dr. W. M. Wolf, a witness for the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is W. M. Wolf. I am a graduate of the medical school of the University of Texas. I graduated in 1899 and came to San Antonio and have been practicing here ever since, some 14 or 15 years. I have had the experience in tubercular cases of a general practitioner. I remember Mr. J. T. Bigger. I was called into see him personally at his family home. I also met his wife. I saw Mr. Bigger about three times, at intervals of a week or ten days, a month or six weeks before his death. He had a very advanced case of pulmonary tuberculosis or lung consumption. He also had tuberculosis of the bowels, which, in all human probability would be a secondary infection; or an infection in the bowels caused by swallowing the sputum. At the time I saw him he was passing 15 or 20 stools a day, with a great deal of griping. He coughed a great deal with this gray, thick tubercular sputum which tubercular patients raise. He was bedridden and finally died. I did not go into any particular history of his case because it was so evident that he was a dying man. I knew there was no use to ask him if he had a family history, and simply gave him something to ease his bowels. That occurred a month or six weeks before he died. I had not been called in to see him previous to that, and those three times were the only times I saw him; and as well as I remember that was in the month just preceding his death. As to whether I know if any other doctors treated Mr. Bigger I will say I remember that Dr. Adolph Herff was called in

to talk over the case and that some other doctors had been treating him, but I do not recall who they were. Judging by the great average run of cases, which was all we could go by, and considering the fact that the deceased was a good big, strong man it would take a year or a year and a half or two years for him to get in the condition he was in. Some patients will have tuberculosis almost a lifetime and others will die within a few months. Those cases that die quickly are called miliary tuberculars; but the chronic cases may go along for 15 or 20 years before death. But the average case, and I will say 8 out of 10, will run a year and a half or two years from the time of infection until they die. Mr. Bigger's death was due to tuberculosis. There is no question about that. But as to how long it had existed I would only be able to judge by the history of a number of cases,—probably a year and a half or two years. Assuming the history of Mr. Bigger's case to be this: That in 1911 he was treated for typhoid fever, along in July; that the doctor who examined him at that time said he had tubercular lung trouble and that it was in the third stage, and the doctor advised him to leave Owensboro, Kentucky, where he was living; that he left there and came to San Antonio in December, 1911. That after being in San Antonio several months he returned to Owensboro and stayed there two or three weeks engaged in breaking in a man in the electrical business; that while he was in Owensboro the weather was rainy and wet; that he left Owensboro and came back to San Antonio through Memphis and Little Rock, Texarkana and Longview in a chair car, no sleeper; that during the time he stayed in San Antonio before his return to Owensboro they claim he

gained 30 pounds; that while in San Antonio he had done no work; that while getting out of the Texas & Pacific train at Longview and crossing over to get into the I. & G. N. car, stopping midway to get in a shed, a distance of less than 100 feet, he claims to have gotten wet on the 10th of August, 1912; that he came on to San Antonio and was taken sick; that he was treated by a doctor; that within 9 days after he returned he had temperature of 104; and from that time on he continued to get worse until the time I saw him and until the time of his death; that he rode all day from Longview to San Antonio in his wet clothes and that he reached San Antonio about 11 o'clock at night,—assuming the testimony shows the above facts, I will say that the exposure and wetting would be a very improbable cause for the deceased tuberculosis. As a matter of fact we are all liable to get wet at any time, and unless we already have tuberculosis getting wet doesn't give it to us. In reference to the fact that Mr. Bigger had had typhoid fever, I will say that the very best of doctors, in the early stages of tuberculosis, will treat it a while for typhoid fever; and that unless they make laboratory tests it is very hard to tell the difference until the lesion in the lungs develops; and it is quite a common error to treat the early stages of tuberculosis as a case of typhoid, and especially is it true if laboratory tests are not made to get the various reactions. And the subsequent history that Mr. Bigger had would lead me to believe that the supposed typhoid fever was the beginning of tuberculosis; and that is the suspicion we would naturally have, considering his subsequent course. Tuberculosis is in the end all due to the same germ, but it has different effect on different individuals, and we

believe that depends more on the individual resistence than the difference in the disease. One man will be able to battle with it a long time and overcome it, and others will go down like flowers in the sunshine, when we say they are susceptible or predisposed to tuberculosis. Taking the man's history as detailed above and taking into consideration that he was about 49 years old when he died, I would presume he must have been a very sick man three months before the time I saw him—the time he is alleged to have gotten wet—because his lungs were practically ulcerated away, and he was nothing but skin and bones, and made the picture of a chronic tuberculosis sufferer, a man that had suffered for months or years, and apparently a man nearly dead with the average case of tuberculosis. Taking into consideration that within 9 days after he got wet his temperature was 104, that would not indicate anything unless I knew his condition before he got wet. Assuming that he was apparently a well man before he got wet I will illustrate my answer by another case: I recently had a man from out at D'Hanis, who went out there with one lung very much involved, and gained 50 pounds and came back nearly a fat man. He afterwards came to me with that history, with 104 fever and an exaggeration of the disease, and I kept him in the hospital three or four weeks and he went back to D'Hanis. Those are the cases of tuberculosis where the patient feels very much better at one time and very much worse at another; and they think they are going to improve and get well and they then start in with an exaggeration of the disease and an increased distress in every way. A patient is sometimes treated with ice packs where he is suffering with hemorrhages; that

is a common, and in fact, an almost universal treatment. I would not attribute much effect to the deceased's having gotten his clothes wet and remaining on him in August. At that time of the year it would not produce a severe chilling. It is true that they put patients in packs where they cannot control the temperature.

## CROSS EXAMINATION.

I was asked about some features of this case before I was put on the stand. Judge Cobbs and no one else asked me the questions. I have also talked to the claim agent and made him a statement. I made him a statement I think along last July or August,—some time last summer. He did not pay me for that statement. It was not a technical statement, but he asked me about Mr. Bigger and I gave him the main facts and he sat down and wrote them out and asked me if I would sign it and I said "Yes" and he got up and walked out and I never thought to give him a bill. There is no specific cure for tuberculosis in the sense of a medicine. Outdoor exercise is not necessary to a cure, but good food and fresh air and rest are the three essentials. There is very little chance to help a tubercular patient with drugs. About all one can do in a case of that kind is to give good advice. Some doctors use what is called Tuberculin in the early stages, and they think they get some results in some cases, but in others they do not. Doctors are not agreed on the results from Tuberculin. If I had a patient who came to me with temperature and in a rundown condition from some other place, and I advise him how to conduct himself and he goes away and in several months he

returns to me free of fever and with a gain in weight of from 30 to 35 pounds,—I would consider that very favorable. I could not expect much better outcome than that; but I would caution him that he must not consider himself a well man yet, not before two or three or five years. If he came to me as described I would say he was on the road to recovery. The different stages in tuberculosis are arbitrary; there is no sharp line between one stage and another; but in the third stage we expect to find the patient expectorating, and with cavities formed, with hemorrhages, temperature, etc., but the line between the second and third stage is not distinctly defined. But few patients in the third stage ever get well. The third stage means not only that the patient is coughing, expectorating and has hemorrhages, but it means that there is a cavity formation also. I would very seldom expect a man in the third stage to brace up and gain a great deal in weight and look normal within a few months. Doctors must judge each case of tuberculosis according to the patient's condition and resistance, and the average case is a very great service to us in making up a prognosis of the patient. If a case shows differently, then it is out of the ordinary. Assuming the following hypothetical case: That along in July, 1911, Mr. Bigger had typhoid fever; that when he recovered from that he was weakened and his lungs were affected; that under the advice of his physician he came to San Antonio for a change from Owensboro, Kentucky, where he was then living; that he came to San Antonio in December, 1911; that he arrived in San Antonio in a badly run down condition, with fever; that he was put upon the treatment which I stated awhile ago was the only treatment that could help him, or the

standard treatment, under the advice of a doctor; that in the course of three or four months he had regained his normal weight, having gained some 30 or 35 pounds; his fever had all gone, and his physician told him he was able to return to work; that in response to a request from his former employers he returned to Owensboro, Kentucky, along in June, 1912, after his temperature was gone, and after he had gained in weight and was apparently all right; that he returned to Owensboro to break in a new man in his former position; that after staying in Owensboro several weeks he got on the train to return to San Antonio was his family were then residing; that on the train a lady saw him who states he looked perfectly well; that at Longview, Texas, on August 10, 1912, he received a severe drenching and continued his trip with his clothing in his grip wet and the clothes he wore wet, and with water in his shoes; that he continued his trip until 11 o'clock at night in the same car; that shortly after his return to San Antonio he developed a pleurisy and was all bent over, and that when he first arrived home he had chills and shivers, and had pains in his head, and from that time on he continued to go down until he reached the condition I saw him in some four months after; and that some 5 months after the wetting he died; and assuming that the doctor was right in stating that the patient was able to go back to work and that his temperature was all gone,—with that hypothetical case before me, I would say that facts stated, the drenching had anything to do with producing the infection. It might have had something to do with precipitating or accelerating it; but that would be doubtful considering the time of the year. But tuberculosis is an infection and one

doesn't get it from getting wet; but they get it from getting the tubercle bacilli in their system in some way. I can hardly answer the question propounded yes or no as to whether the wetting of a man and exposing him to the weather and keeping his wet clothes on him place him in a condition that will affect his lungs and reduce the resisting powers of those lungs; but I will say that, for instance, all of us as boys used to go out hunting and get soaking wet and stay wet all day and not get sick; while on the other hand some other man might get sick who remained out of the rain. As to whether, under the facts stated, the drenching had anything to do with Mr. Bigger's condition when I saw him, I will say I would have to consider in that connection whether or not it was cold enough to produce a chilling of the body. I certainly would not advise a man who had had typhoid fever and who had had tubercular trouble, but who had recovered from it, to sit in his wet clothing all day and until 11 o'clock at night. I would not advise that because it would be disagreeable even if one had never had any kind of trouble; it would not be the sensible thing to do; but we have so much experience with people getting wet that I do not know that that would cause it. I would not give the getting wet as the cause of Mr. Bigger's trouble unreservedly. I could not deny that it effected Mr. Bigger, nor could I affirm, on the other hand, it did have an effect. It might have had an effect, and it might not have had. As to the length of time Mr. Bigger had tuberculosis I was better able to judge, because in those cases of tuberculosis which we call miliary tuberculosis, or a form of blood poisoning, there is not such a violent cavity formation produced in such a short time; and I have never

seen a case like Mr. Bigger's, that I can recall, which was not one of those two or three year old cases. Patients will get that way when the cavities are not healed simply by accident; and a good deal depends upon the physician who told Mr. Bigger he could go to work, as to whether he examined him to see whether those cavities were healed. I would say it would have been somewhat more dangerous for Mr. Bigger to get wet, than it would have been for a man who had never had tubercular trouble. I do know that a man who has once had tubercular trouble has to take better care of himself than a man who has never had tubercular trouble.

## RE-DIRECT EXAMINATION.

In answer to the question as to whether under the facts stated, it would have been worse on the deceased to have gotten wet or to have returned to Kentucky in the following June after he was sent to San Antonio to get well and engaged in work again in a wet climate, I will say that that is a question it is impossible for a man to answer. We all know men who have had a similar history to Mr. Bigger, and who never got wet, but who have taken sick and died; and we have known of other cases where they have gone out and gotten wet and come back and died; and it is such a common thing for a man to be on the road to recovery and then die. In tuberculosis we regard active physical exercise as extremely detrimental to a man's chances of recovery; because it uses up his energy and strength to produce work which he should retain in his body to fight the disease with, and it is burning the candle at both ends, as it were. The fact that Mr. Bigger

left Owensboro with tuberculosis in the third stage and then went back there within six months after he left under the doctor's direction, would be certain to precipitate and start up the disease again; and the taking of the trip would be in the same line; and the returning to Owensboro, I would say, would have more effect on his condition than the getting wet.

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Dr. T. Y. Hull, a witness for the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is T. Y. Hull. I am a graduate of the University of Colorado. I am engaged in the profession of a physician, and am engaged in the special line of heart and lung diseases. I treat tuberculosis. Assuming that the evidence shows the following facts: That in July, 1911, Mr. J. T. Bigger was treated for typhoid fever and that afterwards it was discovered by a microscopic examination that he had tuberculosis, and his doctor told him he had tuberculosis in the third stage; that in December following he came to San Antonio upon the advice of the doctors, and that he remained in San Antonio until the following June; that while he was in San Antonio he gained in flesh; that in June he returned to Owensboro, Kentucky, and engaged in work there for three or four weeks in breaking in a new man in his former position in an electrical business. That while he was in Owensboro, the weather was bad and rainy; that he left Owensboro, Kentucky, and came back to San Antonio via Nashville, Memphis, Little Rock, Tex-

arkana and Longview Junction, reaching San Antonio about 11 o'clock at night of the 10th of August, 1912; that on the way, when he reached Longview Junction on the morning of August 10th, and while he was passing from the Texas & Pacific train to the I. & G. N. train, he claims to have gotten thoroughly wet and drenched; that he came on to San Antonio with his wet clothes on, traveling on the train all day and until 11 o'clock at night; that within a short time, about 9 days, a physician was called in and examined him, when he found Mr. Bigger with a temperature of 104 or 105; that from that time on he grew worse; that he had pleurisy, fever, headache and diarrhea; that in September a physician examined him and found he had tuberculosis of the lungs and in the intestines; that his bowels were bad and running off about six weeks before his death; and that he finally died,—taking those facts into consideration I would hardly think that the wetting received by him in August, while on a hot train, would have any influence whatever upon the deceased's condition. I say that because during the warm weather obtaining in August, it would really be more of a comfort perhaps than anything else; and another thing, his clothing would not remain wet all day on a hot train in August; and in the case of tubercular patients, where they have hemorrhages we always use ice upon the chest. Patients with hemorrhages usually develop fever and we continue the ice and we have no bad results from the use of ice upon the chest of fever patients, no matter what stage they are in. We also often treat with wet pads around the body, and also in some cases where fever is present we place a wet pack of cold water upon the patient and leave them in that for 12 or 24 hours,

and we have never found that had any particular influence upon the patients. So judging from cases of this kind, I do not hardly see how a mere wetting during that time of the year would have a serious influence. The third stage of tuberculosis is the last stage, and is what is commonly spoken of as consumption. When the infection gets into the intestines it is usually the last stage; and that sort of condition usually develops in the last few months of the disease. If the getting wet by Mr. Bigger had any particular effect upon him it would have shown up next day. The getting wet would have nothing to do with giving him consumption; and his tubercular condition must have existed at the time he got wet. In the case as described, where a man first discovered he had the disease in July, 1911, and he died with it in February, 1913, I think that was the natural course of the disease; and under the conditions mentioned I do not see that the wetting would have had any effect on the patient. In my opinion I do not think he would have recovered whether he got thoroughly wet or not. I have not had my tubercular patients to get wet; but we have gotten them wet in treating them.

CROSS EXAMINATION.

I would not advise my tubercular patients to go out in the rain and get wet and keep their wet clothes on. I do not regard that as rational advice; and I am not in the habit of so advising them. I do not think that a rational being would do such a thing, because I do not think there is any occasion for that. It might not lead to any harmful results under the circumstances mentioned. Under the circumstances

mentioned, I do not believe it would lead to any bad results for a person to get wet in the summer time and ride in a railroad train all day and part of a night. I would not advise a man to get wet at 9 o'clock in the morning and ride all day on a train until 11 o'clock at night with wet clothes on, with draughts blowing on him. I would not regard that as the act of a prudent person; I do not think a rational person would do that, simply because a person would try to take care of himself. A man who is not entirely well has to be more careful than one who is entirely well. I was given just a slight history of this case, such as counsel has heard here, before I was put on the stand. I was in Judge Cobbs' office when that was done. Mr. H—— the claim agent asked me to go there. I have seen the claim agent about 5 or 10 minutes once before this morning about the case, I think some time in September. He told me about Mr. Bigger getting wet; but I do not remember telling him that that did not make any difference. Assuming the following facts to be the testimony: That this man, Mr. Bigger, left Owensboro, Kentucky, after having had what was thought to be typhoid fever and lung trouble. The typhoid fever is supposed to have occurred in July, 1911. He comes to Texas in December following and had a remarkable improvement of health. When he gets here he is run down; but in a few months he gains from 30 to 35 pounds; his temperature leaves him, and his physician tells him he is all right to go to work again. He looks normal. He then goes back to his old home temporarily for the purpose of directing a man to fulfill the duties of his former position. His family has moved to San Antonio and he determines to live in San Antonio. When he leaves

here he is apparently in fine health. He goes back to Owensboro and stays several weeks breaking in the new man, but the evidence does show how that was done, whether it was much labor or not. He then returns to Texas along in August, 1912. A lady sees him on the train just a little while before he received a drenching and she says he looked like a man in good health. He received a drenching, and after receiving that drenching he rides on the train all day and until about 11 o'clock at night. Afterwards he begins to feel rigors and to feel bad while on the train. When he gets home he has fever, and a short time afterwards pleurisy develops, and he stoops over to one side; and from that time on he is never a well man, but goes straight down to his death. Assuming those facts to be true, I will say that if the man was in such apparently good health at that time, the getting wet that time of the year would not have had any special effect upon him. If he had been in such apparent good health he would have been able to throw off the effect of such a wetting. I believe it would not have hurt him to have gotten wet in August and stay in his wet clothes for 15 hours. The probability is that in the case counsel has described the party had fever beforehand. Assuming that he had no fever at the time, and that immediately after the drenching he was in the condition stated, I will say that if that man was in the perfect health as was stated, at that time of the year, and under those circumstances the drenching would not have had any effect on him. Assuming that the man was well at the time he received the drenching and that the headaches and pleurisy, etc., followed the next day, it is my believe that the wetting had practically nothing

to do with his condition; and I am willing to swear to that belief. It is probably true that getting a wetting or drenching and sitting in wet clothes would be more apt to injure a person who had been sick and had not returned to his full vigor than a person who was in his full vigor.

RE-DIRECT EXAMINATION.

I do not see how the getting wet by a well man during the time stated (in August) would hurt him. If the party in question came to San Antonio in December, 1911, after discovering he had tuberculosis in July, 1911, and then went back to Kentucky within six months, as to whether he was a well man at the time he went back would depend a great deal upon the doctor's knowledge of his case who told him he was a well man. As to whether he was a well man or not at that time might be a question. In regard to talking to counsel about the case before I was put upon the stand, I will say I was asked by the claim agent to come to Judge Cobbs' office as he wanted to talk to me about the case because I was an expert in lung trouble. I had never met Judge Cobbs before that time that I remember.

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P. F. Crutchfield, a witness for the defendant, having been recalled, testified as follows:

DIRECT EXAMINATION.

I am pretty well acquainted with the town of Longview, as I have been running in there about 18 years. There is a hotel about 50 steps from the depot

on the South side, called the New Brown, and about 10 steps further down is the Smith Hotel, and also a rooming house and cafe; and there is another one, the name of which I have forgotten adjoining it on the West; and then there is another hotel about 100 yards or 75 yards from the usual placing of stopping, called the Model; and right across from the Texas & Pacific tracks at the end of the depot is another hotel; and then comes a store, and just across the street running East and West are several stores and a bank building on each side of the street, and a drug store. All these buildings and stores were in plain view from the place Mr. Bigger was in at the shed.

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Thereupon the Defendant, through its counsel, announced that it had rested its case.

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## PLAINTIFF'S EVIDENCE IN REBUTTAL.

V. W. Fuqua, a witness for the Plaintiff, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is V. W. Fuqua; I am solicitor for the Stires Sign Company, bill board advertisers. I knew Mr. Bigger in his life time in 1912, prior to the time he left San Antonio for Owensboro, Kentucky. I knew him in the spring and winter of 1912. Mr. Bigger looked to me like a strong man; and he looked like he would weigh 150 or 160 pounds. He appeared

to be about five feet eight inches, or five feet seven or eight inches in height. I was a neighbor of Mr. Boles and I met Mr. Bigger there. Mr. Boles lives at 115 Ogden Street and I live at 117 Ogden. I do not know whether Mr. Bigger was stopping at Mr. Boles, but I met him there in the spring of 1912; and I met him off and on there until I went to Corpus Christi, some 60 days later. I never heard Mr. Bigger cough. I was with Mr. Bigger a good deal for about 60 days. I was with Mr. Boles and Mr. Bigger on Sunday afternoons, and we would take long walks.

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Mrs. Ludie Bigger, a witness for the Plaintiff, having been recalled, testified as follows:

DIRECT EXAMINATION.

When I testified as to the ages of my children I gave the ages of them at the present time. My eldest boy is now 22 years old. He was 21 years old in September previous to the time J. T. Bigger died in February. My husband had made arrangements about educating my oldest boy, provided Mr. Bigger lived. We had talked of giving him a course in Draughon's business college; but that plan was not carried out because his father, J. T. Bigger died. My youngest child is 2 years old at this time. Prior to the time my husband had typhoid fever in the summer of 1911 he was a well man, and never had anything except such things as colds. He worked regularly and did not take a vacation for 18 years at the place he was working. He never had a cough

previous to the time he received the drenching on August 10, 1912; and his bowels were not affected in the least or running off until within a few weeks of his death.

CROSS EXAMINATION.

I never said I never heard my husband cough; but I said he never coughed like he had a real bad cough.

RE-DIRECT EXAMINATION.

I was in San Antonio when J. T. Bigger left for Owensboro. At that time he was perfectly well, and weighed about 150 or 160 pounds, which was about his normal weight.

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C. E. Callaway, a witness for the Plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is C. E. Callaway. I am superintendent of a laundry, the New Process Laundry Company. I am also part owner of it. I knew Mr. J. T. Bigger during the spring of 1912. I remember seeing him just after he was supposed to have come from Kentucky. At that time he looked run down. He did not have a cough at that time that I know of. I believe that was along about the first part of 1912. Later on I saw him several times. At that time he was much better. The first time I saw him he was very thin and in bad health; and then after he went

out to Terrell Wells and came back he had gained about 30 pounds in three or four weeks and one would hardly know him. I do not know exactly when Mr. Bigger went back to Kentucky. The improvement in Mr. Bigger was marked, and he looked like a well man.

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Thomas Boles, a witness for the Plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is Thomas Boles and I am employed by the New Process Laundry as route foreman. I was acquainted with J. T. Bigger in his life time. I knew him back in Owensboro. I knew him about 10 years before I came to San Antonio, and have known him altogether about 14 years. I knew him pretty well in Kentucky in a business way, and I traded with him about 4 years in the grocery business. When I knew Mr. Bigger in Kentucky his health was good. I left Kentucky before Mr. Bigger did. When Mr. Bigger came to San Antonio he tried to locate me, and he phoned me at the laundry and I went to see him. At that time he looked very bad. He wanted to go out and board with me, and of course, I didn't take him; and I went back in a day or two and he seemed to improve a little; and I then made arrangements for him to get board near the Terrell Wells and he went out there, and I did not see him for about three weeks. When I went out there at the end of three weeks he had gained considerably. I brought him in and weighed him and found he had gained 35 pounds during the 6 weeks he had been in San

Antonio. At that time he had been here about two months and was boarding at my house. He would come down to my place of business every day or so, and went with me and helped me considerably while I was out on my work; and he also helped considerably about my home. At that time he appeared to be in perfectly good health. He did not have a cough. I know when he left to go to Kentucky. His wife came to San Antonio and he left my house and moved to 400 S. Avenue. I never noticed Mr. Bigger cough at all, and never noticed him cough at night when I was with him. His voice was natural. His voice never was affected; but he had a good clear voice. I saw Mr. Bigger weighed about two weeks before he left, and at that time he weighed 162 pounds. I recall that time.

CROSS EXAMINATION.

Mr. Bigger and I were not great friends. I never knew Mr. Bigger only through business matters and never was at their house. I did not take a great deal of interest in his affairs. I did not suggest to him to employ lawyers; but he told me he wanted to get a lawyer and I investigated the matter and got him a lawyer. In Mrs. Powers' case I only referred Mrs. Powers to the same lawyers. I interested myself in the matter of bringing suit after I found out the condition they were in, and I helped them all I could. I said Mr. Bigger did not cough before he went away; but when he came back he was coughing. He never coughed during the whole time he was here first. I did not know what Mr. Bigger came to San Antonio for; and he never told me he came here because he had consumption. I never

heard he had consumption until he got sick; but he had typhoid fever and it had gotten him down. I never heard he had lung trouble. He said the doctors sent him down here because he had it. He moved his whole family down here to live, and he came here to live and he boarded with me a part of the time; but I didn't know he had consumption. I never heard he had it, either from him or anybody else. I did not know he came to San Antonio because he had lung trouble; but I knew he could not live in Kentucky so he came to San Antonio. I weighed Mr. Bigger the first time, but I did not put his weight down. I was Mr. Bigger's friend and I remember what he weighed. I think the first time he weighed he weighed 110 pounds. I say that because I weighed him. He was about five feet 9 inches tall. When I knew Mr. Bigger in Kentucky he weighed about 160 pounds, and when I first saw him here he weighed about 110 pounds; and then he went out to Terrell Wells and came back with a gain of 35 pounds. I think he weighed about 153 when I brought him back from Terrell Wells. I did not say he weighed 110 pounds when he weighed first; I said 115 pounds. I don't remember, when I weighed him first what his weight was; but I know he gained 35 pounds. It is not true that as a matter of fact I don't know anything about his weight; but I do know he gained 35 pounds. I never heard Mr. Bigger cough before he went back to Kentucky. I knew he couldn't live in Kentucky because he was sick, so he had to come to San Antonio. I did not weigh Mrs. Powers.

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Dr. A. F. Hertzberg, a witness for the Plaintiff, having been duly sworn, testified as follows:

## DIRECT EXAMINATION.

My name is A. F. Hertzberg. I am a physician and surgeon. I have been practicing that profession 29 years in all and 28 years in San Antonio. I am a graduate of Bonn on the Rhein, Germany. I have practiced medicine since I graduated from that university. Assuming the following hypothetical case: A man, who had been apparently in good health up to the summer of 1911, is taken with what was thought to be typhoid fever; and upon recovering from that after a sickness of about four weeks, it was found his lungs were affected. He was advised by physicians to make a change in climate. Along in December of that year he came to San Antonio, put himself under the advice of a physician. He improved wonderfully and gained between 30 and 35 pounds within two and a half to four months. His doctor says he was having temperature when he came to San Antonio, but the evidence shows he had no cough and his voice was always normal or natural. After he had gained in weight up to his normal weight and his temperature had left him his physician told him he to go to work. After that he returned to his old home for the purpose of breaking in a man to do the work he had previously done; but we do not know how strenuous that work was as the evidence is silent up that point. He remained at his old home several weeks and was making his return trip to San Antonio. A lady saw him on the train and states he looked like a perfectly healthy man. While on that trip he was exposed and received a severe drenching wetting him so thoroughly as to cause water to be in his shoes and wetting the clothes in his grip. The wetting occurred about the 10th of

August, 1912, just about a year from the time he had the typhoid fever. He travels all day in a chair car on the day he gets wet and up until 11 o'clock at night. Before he got home he began to have rigors and chills, and after he got home he developed fever and a pleurisy condition. A few days after he got home a doctor was called, and his temperature went up violently and he went to bed practically, and drifted into tuberculosis and died on the 28th of February, 1913, about 6 months after the exposure. Viewed from a medical standpoint and from my experience as a doctor, there is no doubt in my mind that the severe drenching at the time described was perfectly capable of producing a recurrence of the tubercular condition in the patient. We all know at the present time that tuberculosis is a perfectly curable disease; but there is always a probability that the bacilli remains hidden in the body somewhere. Now, so long as the patient takes perfect care of himself, and there is no interference, then so long will this bacilli be harmless; and in fact they may even be destroyed at the time. We have not one but thousands of cases on record where tubercular bacilli is found in the body where cases have occurred 20 or 30 years before. Now if there be any interference, such as this drenching that was described, with its severe effect even on a healthy man, it will weaken the power of resistence and these little bacilli will renew their activities, and, as a rule, in such cases they take a very rapid course. Therefore I could certainly trace, in my opinion, the condition of the man in the hypothetical case, and his death directly to the exposure he suffered.

## CROSS EXAMINATION.

I said that tuberculosis is an absolutely curable disease. I have been practicing in San Antonio 28 years. I was born in San Antonio and raised here. San Antonio is a place where many people come to be cured of tuberculosis. Assuming the following hypothetical case: That in August or July, 1911, the man in question was treated for typhoid fever. He lived in Owensboro, Kentucky, at that time. That several doctors have testified he had tuberculosis in its third stage at that time, which was determined by a microscopic examination; that the doctors sent him away from that country to San Antonio; that he came to San Antonio to live and moved his family here. That he stayed in San Antonio from December until June, doing nothing. That during that time he was treated by an Osteopathic doctor, and that the doctor told him he was well. That in June, 1912, he was called back to Owensboro, where he had formerly been engaged at work, for the purpose of breaking in a new man in some kind of electrical business; that he stayed in Owensboro several weeks; and while he was there it was rainy. Then he left Owensboro and came back via Nashville, Memphis, Little Rock, Texarkana, Longview and on to San Antonio; that on his way back at Longview he claims to have gotten a severe drenching. That a few days after he got back to San Antonio, a severe fever of about 104 developed. Under the history just given the only thing I could attribute his condition to would be the severe drenching he received at Longview, because there was no other cause given. I certainly would not ignore absolutely the history of his lung trouble; but undoubtedly tuberculosis was

present in the man, and as I explained before it could be absolutely latent. At the time he got wet tuberculosis was in the man's system in a latent condition.

Sometimes it takes only about two weeks to create the condition of advanced tuberculosis and the tubercular condition of the bowels that the deceased had. I myself have made that kind of work my chief examination work, or rather thesis, when I was at the university. Counsel may know that at Bonn especially that half the work of diagnosing tuberculosis has been done. I had a man for my patient who was brought into the interne clinic to be treated for tuberculosis. He was examined not only by me but by some of the staff and it was found he had incipient tuberculosis, and that man died on the 27th day with full flame of tuberculosis. He was a strong man, and those are the kind of men it takes very quickly. Intestinal tuberculosis is a secondary condition to the pulmonary tuberculosis. As to whether it arises from the condition of the lungs previous to that time has to be determined; and if Dr. Wolf and Dr. Jackson said it did, I would tell them, with all due deference, that the question has not been settled. I am of the opinion that tuberculosis is primarily of the digestive organs. It could come by digestion of diseased food, and the first symptoms very nearly always arises from the lungs. If it doesn't arise from the lungs it may arise from digestion of the food. One opinion is that tuberculosis comes from the lungs and another is that it comes from the digestion; but I say I do not know whether it comes from the one or the other. Take myself or any perfectly well man who left the Texas & Pacific train at Longview in a rain and walked across to the I. & G. N. train, stopping a while on the way in a shed, and who

gets thoroughly wet there; that the time of the year is August; that he gets his clothes wet and gets in the train and comes on to San Antonio, riding from 8 o'clock in the morning until 11 o'clock at night,—I would say that such a wetting would hurt any man, no matter how strong he is; and it would certainly hurt a man who had previously had tuberculosis. I believe such a wetting would have a detrimental effect on anybody. It may not give him consumption if he is absolutely healthy and strong; but if he has had tuberculosis before and he undergoes the severe wetting of that kind, then he is certain to develop the trouble. The tuberculosis was already existing in his system in some way; and no man can tell what produced it, a doctor or anybody else.

## RE-DIRECT EXAMINATION.

If a man has had a history of having had tuberculosis in the third degree as stated—which I am inclined to doubt that this man did—and he recovers within a few months and gains in flesh and is free of coughing and free of any tubercular symptoms, I would personally consider him cured,—that is what we call cured. Now let me state that I am not the only one that says that it can be cured, but there are places in this world where they cure about 30 per cent; and if a man takes care of himself he is all right; but if a tubercular patient doesn't take care of himself he is worse off than other men ordinarily.

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Thereupon both sides announced that they rested their respective cases.

The Court refused to give instruction to the jury, to which ruling of the Court, counsel for Defendant, then and there in open Court in the presence of the jury, and before the jury retired duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed nunc pro tunc, as of January the 8th, 1914.

Dated this 18th day of March, 1914.

T. S. MAXEY,
Judge.

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## BILL OF EXCEPTION NO. 3.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered,* the following proceedings were had on the trial of this cause, towit:

The defendants except to the Court's General Charge as follows:

(1) He has not charged all the law on the question of the duty of a passenger while riding on the train.

(2) Because he has emphasized too much the duties of the carrier.

(3) Because the Court has erred in charging the

jury that it is the duty of the railroad company to provide adequate accommodations for passengers where they could alight to change cars and where they could be protected from the inclemency of the weather. There is no evidence that they did not provide an adequate place for them to alight.

(4) Because it was error in the Court to submit to the jury to ascertain if the employees of the defendant required the deceased to get off the train in a severe rain and his illness and death resulted therefrom, without any fault or negligence on his part and plaintiffs would be entitled to recover; because there is no evidence that he was compelled to get off.

(5) Because the Court erred in instructing the jury that as a common carrier the duty of the defendant to its passengers on its train did not end by merely stopping the train at Longview Junction; whereas the duty of the railroad, as a common carrier and the relation of passenger ceased when the railroad gave a proper place for the passenger to get off, and that the passenger did get off at a safe place, the duty of the common carrier and the relation of passenger then ceased; and the duty alone was not on the Texas & Pacific to take care of passengers travelling on a through ticket, and the Texas & Pacific had performed its duty in carrying the passenger safely to Longview.

Be it remembered on the 8th day of January, 1914, in open Court, when and immediately after the Court had read its charge to the jury and before the jury had retired to consider of their verdict, the defendant, Texas & Pacific Railway Company, then and there in open Court excepted to said charge in toto and pointed out the foregoing objections and ex-

ceptions thereto, and now here in open Court tender the same as its Bill of Exception, which it prays to be now here signed, approved and made a part of the record hereof, and the same is now here accordingly done and signed nunc pro tunc, as of January 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23rd, 1914.

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## BILL OF EXCEPTION NO. 6.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered,* that on the trial of the above styled cause Plaintiffs offered the testimony of the witness Dr. E. P. Dougherty, who testified as follows, towit:

Q. (By Mr. Carter) Your name is?
A. E. P. Dougherty.
Q. What is your profession, Doctor?
A. I am an Osteopathic physician.
Q. Where?
A. In San Antonio.
Q. How long have you been practicing that profession?
A. About three years in San Antonio.

Q. All together?

A. About four years and a little over.

Q. About four years?

A. Yes, sir, about that time.

Q. Are you a graduate of any medical school?

A. No, sir.

Q. You have a license?

A. I have a license in this State to practice anything I want to,—medicine, surgery and Osteopathy.

Q. Medicine, surgery and Osteopathy?

A. Yes, sir.

Q. Doctor did you know J. T. Bigger in his life time?

A. Yes, sir.

Q. Did you know him before August 10, 1912?

A. Yes, sir.

Q. Just tell the jury what kind of man he was?

A. Well, I knew Mr. Bigger about 15 years ago, and although he never came under my care until he came to San Antonio—want me to begin then?

Q. Yes, sir.

A. Mr. Bigger came to my office, I think the latter part of December, or the first of January, 1911, for examination; and after getting a history of his condition and making an examination I told him what I thought of his condition and advised what he should do; just simply gave him advice as to how he should take care of himself. I thought possibly with conditions here and good care he might get all right; and he would come into my office every week and maybe every two or three weeks; and after he had been down here in the neighborhood of several months he had gained quite a good deal, that is, he was getting in good shape for a patient in his condition; and possibly I examined him several times

in those several months, and he wanted to know if I thought he could go to work, and I told him I didn't doubt but what he could, especially if he would get some outdoor work; and after that, may have been a month or so he came into the office and had a letter from Mr. F——

Mr. Carter: Just tell about his condition; what was his condition.

Witness: Well, he told me they had offered him——

Judge Cobbs: We object——

Mr. Carter: This is not admissable, Doctor——

Witness: Well, he asked me if I thought he could go to work and I told him he could go to work here——

Judge Cobbs: I am objecting to this. He doesn't seem to be an expert; he is not qualified to give his opinion about that.

The Court: You might qualify him.

Judge Cobbs: Well, isn't that their duty first?

The Court: Qualify him gentlemen as an expert if you wish him to testify as an expert.

Q. (By Mr. Carter) All right, Doctor, just about that time that he came to you with that letter, tell us what his appearance was, and if he had improved?

A. Mr. Bigger, when I first saw him was in a run down condition.

Judge Cobbs: Now, if the Court please, we object.

Mr. Carter: He is not testifying as an expert. He can testify what his appearance was and let the jury determine.

A. Well, he was in a run down condition; and I told him if he could get in the outskirts of the city

it would be better for him, and I put him on a diet and he improved very rapidly. He did just what I told him to; he slept out of doors all the time and he told me——

Judge Cobbs: We object.

The Witness: He gained about 30 pounds in three months, and then he gained off and on until he went back to Owensboro several more pounds.

Q. What was his condition doctor when he went back?

A. His condition when he went back, why, was very good; he was able to go to work.

Q. When did you first see him after he came back from Owensboro?

A. It was three or four days, I think. He was in very bad shape; in fact, was in my office and I told him he had better go home and go to bed and stay there.

Judge Cobbs: We move to exclude all that testimony.

The Court: Overruled.

Judge Cobbs: We except.

A. When he was in there he had a very high fever; was coughing and complaining of his lungs being very sore, and he had a sort of pleurisy. He went ahead and told me what happened to him. I says go home and go to bed; and I would suppose two or three times after that he was in my office; several times he was brought up in a buggy, and several times after that I saw him at his residence.

Q. How did that condition continue?

A. Well, he continued to decline. He was hardly able to get around to do anything from the time he was in the office; he began to go right down.

Q. Well, what was he suffering with after he came back from Owensboro?

A. Well, his condition was due, from what I could get from his history, to his exposure and from getting out in the rains.

Q. Well, what was his condition?

A. Well, he had pleurisy and a very bad cough; and I don't think there was any doubt it was from getting wet, from the temperature which goes with the condition. The exposure possibly had, as physicians say, lighted up the trouble.

Q. Well, how did he progress?

A. He simply declined from then on down. I don't remember how long he lived after that but he was never able to get up and down after that.

Q. He is dead now?

A. Yes, sir.

Q. Now, from the history of the case, Doctor, what in your opinion was the condition you found him in after the 10th day of August, 1912——

Judge Cobbs: We object to that.

The Court: Are you qualified to express an opinion as to that point?

The Witness: What's that.

Mr. Carter: What in your opinion produced the condition you found him in after the 10th of August?

The Witness: Yes, sir, I am qualified to answer the question.

Judge Cobbs: We except.

The Court: All right.

The Witness: In my opinion he had developed tuberculosis. In other words it had been lighted up and started anew.

Because said testimony was irrelevant and incompetent, opinion of the witness, not based upon sufficient knowledge, not shown that he was an expert and competent to testify in such cases and is but the conclusion of the witness, which objection the Court overruled and the said Defendant then and there in open Court excepted to said ruling and herein tenders its Bill of Exception and asks that same be signed and made part of the record in said cause, which is accordingly so done, *nunc pro tunc,* as of the 8th day of January, A. D. 1914.

Dated this 18th day of March, 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 4.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered,* That on the trial of the above stated cause on the 8th day of January, A. D. 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1 requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and there-

upon counsel for the plaintiff requested the Court to charge the jury before it retired as follows:

"At the request of the Plaintiffs you are instructed as follows:

The defendant, Texas & Pacific Railway Company, owed to its passengers the duty to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances, and the failure to exercise such degree of care would be negligence," which was given by the Court.

Defendants contended that there was no testimony introduced that justified the submission of the foregoing charge sufficient to require the Court to so charge the jury under the law or the evidence, as will be seen, as aforesaid, from the inspection of the testimony set out at length in said Bill of Exception No. 2. The Court gave said instruction to the jury, to which ruling of the Court counsel for defendant then and there in open Court and in the presence of the jury and before the jury retired, duly excepted to the giving of said charge by the Court and reserved this its said Bill of Exception to the end that the same was noted and that the matter thereof might be placed of record and the same is here now accordingly done and signed *nunc pro tunc as* of January 8th, A. D. 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

## BILL OF EXCEPTION No. 5.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered*, That on the trial of the above entitled cause, the Plaintiff offered in evidence the testimony of Mrs. Ludie Biggers, as follows, towit:

Q. (By Mr. Carter) What was the condition of the clothes in his (J. T. Bigger's) valise?

A. They were all wet. I took them out next morning and hung them out the next morning on the line.

Judge Cobbs: We object; it is immaterial.

Mr. Carter: We think it is very material.

The Court: Well, it will go in.

Judge Cobbs: We except.

Q. The clothes in his valise were wet?

A. Yes, sir.

Q. And you hung them out on the line?

A. Yes, sir.

Q. (By Mr. Carter) Mrs. Bigger, now I will ask you if your husband had made any arrangements about his (oldest boys) education providing his father lived?

A. Yes, Sir.

Q. What were they?

Judge Cobbs: We object to that "any provision she made for the education of the child while the father was living," I don't see how that can enter

into this case. It is irrelevant, incompetent and immaterial.

The Court: I will rule it out, gentlemen.

Mr. Carter: The point was this, if your Honor please. Of course, the boy was above 21. In order to say there is a measure of damages it is competent to prove any expectancy he may have had from the parent, notwithstanding he had reached his majority; and that of course been held to be absolutely admissible, because there is no——

The Court: Have you any authority?

Mr. Carter: Any testimony that would tend to show that an adult child, or mother or father would have received something from an adult son has always been held to be admissible. There are many authorities on it and I wouldn't care to offer it unless it were clearly admissible. What I want to prove was this expectancy, and I have no doubt of its admissibility, otherwise there might be some question about the right of the adult son to recover at all for the loss of the father unless he showed some expectancy. You see the measure of damages is confined to what he might have expected had his father lived. What he expected to do for his adult child if he lived has always been held to be admissible. I don't think there would be much question about the authorities being all one way upon that proposition.

Mr. Cobbs: If the Court please another ground is hearsay and it is incompetent, and furthermore it is not in rebuttal to anything we brought out.

Mr. Carter: I will admit it is not in rebuttal; but that is a matter of discretion; it is just to answer one question.

The Court: I will let it in.

Judge Cobbs: We except.

Q. Mrs. Bigger, state now what you and your husband had determined in regard to the education of your eldest son had his father lived?

A. We had talked of giving him a course in Draughons Business College, etc.

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Q. Now, prior to the time—in the summer of 1911, when you say your husband had typhoid fever, what had been the condition of his health generally?

A. Well, he was a well man.

Judge Cobbs: We object to that going over the same ground.

Mr. Carter: That is clearly rebuttal.

The Court: I will let it in.

Judge Cobbs: We except.

Q. What was the comparative condition of his health prior to the typhoid fever you spoke of?

A. He was a well man; never had anything but a little illness, like cold, something like that.

Q. Did he work regularly?

A. Yes, sir, he didn't take a vacation for 18 years where he was working.

Judge Cobbs: Your Honor understand we are objecting to all that.

Q. Now, I will ask you if he ever had a cough previous to the time he received that drenching?

A. "No, sir."

The cause of objection urged against her testimony in respect to the clothes that were wet and were in his valise and hung out on the line as stated, was immaterial and irrelevant and prejudicial; and in respect to her testimony concerning arrangement-

made by her for her eldest son's schooling, etc., and for the provisions she had made for the education of the child while the father was living, what it was expected he would do for him if he lived (not a proper element of damage) and all of the balance of the testimony was likewise irrelevant, immaterial and prejudicial, which objection the Court overruled and the defendant did then and there in open Court except to said ruling and herewith tenders its Bill of Exception and asks that same be signed and made part of the record in said cause, which is accordingly so done, *nunc pro tunc,* as of the 8th day of January, A. D. 1914.

Dated this the 18th day of March, 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 7.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered,* That on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Ex-

ception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

"If the jury believe from the evidence that the rain and water that J. T. Bigger encountered after leaving the cars of the Texas & Pacific Ry. Co. at Longview, would not have caused said alleged injuries had he not have had the alleged sickness at the time, unknown to defendant, you will find for the Defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is

now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 8.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered,* That on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

"If you believe from the evidence that J. T. Bigger, Deceased, knew or could have ascertained by the use of ordinary care, that there was an International & Great Northern coach attached to the train of cars upon which he travelled from the point he entered which he could have entered at or before reaching

Longview, and would have thereby been protected from the rain and would not have gotten wet, and failed to do so, you will find for the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

## BILL OF EXCEPTION No. 9.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered,* That on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

"Defendant requests the Court to charge the jury, that under the law defendant Railway is charged with the duty of transporting its passengers with a high degree of care while on its train and to stop its train for a sufficient length of time for its passengers to safely alight, alight at a regular station or at the end of their journey. If therefore you find that defendant was guilty of no negligence in transporting J. T. Bigger safely to Longview Junction and the train was stopped at its usual place for the station and he was given ample time in which to leave said train, then in such case the defendant would have discharged its duty to plaintiff and you will find for the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 10.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered,* That on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

"This defendant discharged its legal duty by safely transporting J. T. Bigger as a passenger to Longview, and is in no wise responsible for the result of any injuries that may have been received from the elements that caused him to get wet after leaving its train of cars at Longview, for when he there left said train the defendant owed no further duty to protect him from an unusual rainstorm, as he had then ceased to be a passenger on defendant's train, having reached the point of destination as a passenger on said road.

COBBS, ESKRIDGE & COBBS,
Attorneys for T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge.

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for de-

fendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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BILL OF EXCEPTION No. 12.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law*.
I. & G. N. Ry. Co. et al

*Be It Remembered*, That on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

"I further charge you that you will not consider

any damage or any condition of J. T. Bigger that arose from the alleged accident or claimed injuries, unless you find from a preponderance of the evidence that J. T. Bigger did not contribute any way to his condition and in order for plaintiffs to recover, it devolves upon them to show that J. T. Bigger exercised ordinary care and prudence in taking care of himself and that his act and conduct did not contribute to the said injuries, followed in an unbroken sequence from injuries received, resulting from the rain and that the same directly and proximately caused and produced the injury he claims to have received, if any, by reason of the water.

COBBS, ESKRIDGE & COBBS,
Attorneys for T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified admission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserve this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now

here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 11.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* That on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

"If you believe from the evidence that J. T. Bigger was a through passenger to San Antonio, and the ticket or transportation required him to change from the Texas & Pacific Ry. Co. cars at Longview for the International & Great Northern Ry. Co., he was required as a matter of law to leave that train at Longview after its arrival, and he no longer had

any legal right after a reasonable time after its arrival to remain on said train, having arrived at his point of destination over the Texas & Pacific Ry. Co., and it was his duty to immediately leave said train at that point for he had no legal right thereon as a passenger thereafter, unless he desired to become a passenger upon said train and so notified defendant of his purpose, in which case he was required to secure another ticket or pay his way thereon for all rights as a passenger ceased at Longview by virtue of the ticket he purchased, via the International & Great Northern Railway Co. route, and the defendant had the legal right to order and compel him to leave the train unless he indicated a purpose and desire to continue further as a passenger thereon, by securing a ticket thereon or by paying a cash fare to the place he wished to travel to, and you will so find by your verdict in favor of defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all snch issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly

excepted to the refusal of the Court to give said charge and reserve this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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BILL OF EXCEPTION No. 13.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* That on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

"If you believe that J. T. Bigger's condition as alleged, was brought about by reason of his prior condition and acts and conducts thereafter, and that the same would not have occurred except for

the result of his own negligence and want of ordinary care, such as no person of ordinary care and prudence would have done, and that the Railroad Company was not guilty of any negligence resulting from its acts, which were the proximate result of his alleged injuries, but was on account of his own carelessness and want of care in taking care of himself, which was the proximate cause of his injuries, you will find for the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserve this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

## BILL OF EXCEPTION No. 14.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"J. T. Bigger was bound to use all means reasonably under his control and within his power to take proper care of himself after getting wet at Longview Junction, Texas, if he did get wet as alleged in Plaintiff's Petition, and if you believe from the evidence that it was his duty to have gone to a Hotel or some other place of safety and where he could have gotten dry clothing, or if you believe from the evidence that it was his duty to have had dry clothing with him, and he could have changed them on the train and thereby saved him from the alleged injury, or if you believe that after reaching San Antonio if he had within reasonable time, called in a physician and taken proper treatment, that he would have recovered from the injuries resulting from getting wet, if any, and if you further believe that he did

not do any of these things and that in not so doing he was not acting as an ordinarily prudent person would have acted, then you are charged that Plaintiffs cannot recover and your verdict should be for the Defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury; to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserve this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

## BILL OF EXCEPTION No. 15.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co et al.

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"If you believe from the evidence that at the time J. T. Bigger, Deceased, boarded the train for passage to San Antonio, Texas, as alleged in the Petition, that he was suffering from lung trouble or consumption, and that he knew this fact, and if you further believe from the evidence that such fact was not brought to the knowledge of the defendants herein, or any of them, and if you further believe from the evidence that the said Bigger did not provide himself with a change of clothing and carry same along and that such failure was negligence on his part, and that an ordinary prudent person under similar circumstances would have so carried a change of clothing, or if you further believe from the evidence that he, in changing cars at Longview Junction, Texas, became soaked with rain or water, as alleged

in his Petition, and if you further believe from the evidence that an ordinary prudent person under similar circumstances would have ascertained before reaching Longview Junction, that a through San Antonio coach was in the train on which he was a passenger, or if you find from the evidence that an ordinary prudent person, under similar circumstances, would have, after getting wet, taken care of himself by providing himself with a change of dry clothing or by going to a hotel or some place of shelter and not proceeding on his journey, as he did; and if you further believe from the evidence that the getting wet in his then physical condition resulted in any of the injuries alleged in their Petition, and that he would not have suffered such injuries except for having been in said physical condition at the time of so getting wet; or if you believe from the evidence that if he had had a dry change of clothing to have immediately put on, or that if he had gone to a hotel or some other place of shelter and not proceeded on the journey, he would have avoided suffering the injuries that it is claimed he suffered, then you are charged that plaintiffs are not entitled to compensation for such injuries as against the defendant herein and your verdict should be for the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in

connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 16.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made

a part hereof, for all of the facts proven on said trial and on point preserved herein, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"If you believe from the evidence that at the time J. T. Bigger, Deceased, boarded the train, if you believe he did so board said train, for passage to San Antonio, Texas, that he was then suffering from lung trouble and that he knew this fact, but that the defendant did not know of same, and if you further believe from the evidence that when said train reached Longview Junction that he, through the negligence of the defendants, or either of them, became soaked with rain and water as alleged in his Petition, which said getting wet caused or resulted in any of the injuries or illnesses complained of in Plaintiff's Petition, and if you further believe from the evidence that such injuries and illnesses would not have occurred except for the fact that the said J. T. Bigger was at said time sick, as hereinabove stated, then you are charged that the plaintiff cannot recover and your verdict should be for the defendants, and you will so find.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 17.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point preserved herein, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"Defendant Texas & Pacific Ry. Co. further requests the Court to instruct a verdict for it without prejudice, to sue elsewhere, because the evidence shows this suit was brought in this court by an amended pleading filed herein on the 16th day of May, 1913, by the plaintiffs, as surviving widow and children of the said J. T. Bigger, who died after said suit was instituted and said cause of action abated with his death and this court was without jurisdiction to proceed further with this suit, as the Texas & Pacific Ry. Co. is a corporation not in this jurisdiction, defendant having already excepted to said jurisdiction.

COBBS, ESKRIDGE & COBBS,

Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is

now here accordingly done and signed *nunc pro tunc*, as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 18.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law*.
I. & G. N. Ry. Co. et al

*Be It Remembered*, that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point preserved herein, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"Defendant requests the Court to charge the jury that the evidence of all persons and witnesses who swore in this case, in the employment of the Railroad Company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. That the jury should regard the testimony of every witness sworn of defendant,

but it is their duty to give to the evidence of witnesses the weight to which in their opinion, as conscientious men seeking the truth, they believe it is entitled to and that the employment and business of a witness affords no reason why such evidence should arbitrarily, or without reason, be disregarded.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

## BILL OF EXCEPTION No. 19.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"The law requires all railroad companies in this State to provide and maintain adequate, comfortable and clean depots and depot buildings at their several stations, for the accommodation of passengers, and to keep said depot buildings well lighted and warm for the comfort and accommodation of the traveling public. If therefore, the jury shall believe that there were sufficient depot and other buildings at Longview Junction to comply with the law and if they should further believe from the evidence that there were sufficient depot and buildings at Longview Junction, Texas, to shelter passengers and to protect them from the rain while waiting for trains, defendant would not be liable for any injury claimed as the result of his getting wet from the rain,

as testified to, which fell on him in transferring from the train of the Texas & Pacific Railway Co. to the train of the International & Great Northern Railway Co. at Longview Junction, where the journey upon the Texas & Pacific Railway line terminated, if the jury should believe he was transferred with safety and care from Texarkana to Longview and sufficient time given him on the arrival of said train at the termination of his journey over the line of the Texas & Pacific Railway Company, to get off said train at Longview Junction to take the train of the International & Great Northern Ry. Co. from Longview to San Antonio.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is

now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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BILL OF EXCEPTIO No. 20.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"Defendant requests the Court to charge the jury that the cars of the railroad company are not hospitals nor their employes nurses. Persons who are ill have a right to enter the cars of the Railroad Company and travel therein; as a common carrier of passengers the company has no right to prevent them, but

the increased risk arising from conditions affecting their fitness to journey, where they are unknown to defendant, must rest upon the shoulders of the plaintiff and in rendering your verdict you will give full consideration to all of the facts and circumstances connected with the said J. T. Bigger and his conduct from the time he entered said car until he left the same as bearing upon issues as to whether or not he exercised that care and prudence which an ordinary person under similar circumstances would have exercised, and if you find that he did not exercise ordinary care and prudence under the circumstances and believe that his act and conduct contributed to his condition, you will find for the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter

thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 21.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"The Defendant requests the Court to charge the jury that if they believe from the evidence that the condition of J. T. Bigger when he entered the cars for a trip to San Antonio, was sick and that he knew at that time his condition of health was such as to increase the chances of injury to him by exposure and

in such condition that he failed to use care and prudence to avoid exposure, and that his condition was well known to him and not known to defendant at the time, and that but for his condition at that time and at the time he changed cars, and he knew of his condition, that defendant would not be responsible for any injury that might result to the plaintiff in the transferring from the Texas & Pacific Ry. cars to the International & Great Northern Ry. cars, unless you should believe that such injury would have resulted to him independent of the fact as to whether or not he was sick, and in arriving at your verdict you will consider all the facts and circumstances in connection with his condition and then determine whether or not he used that ordinary care and prudence which an ordinary prudent person would have exercised under similar circumstances.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception,

and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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BILL OF EXCEPTION No. 22.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"If you believe from the evidence that the illness of J. T. Bigger, Deceased, was traceable to his physical condition at the time he transferred from the Texas & Pacific Ry. Co. to the International & Great Northern Ry. Co. in the rain before he got wet, if

you believe it was raining, and you further believe that his alleged injury and complaint was not traceable to the proximate result of defendants' negligence but to his own want of ordinary care which contributed to and was the proximate result of his condition at the time, you will find for the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

## BILL OF EXCEPTION No. 23.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger

vs. No. 192, *Law.*

I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"If you believe from the evidence that on August —, 1913, J. T. Bigger, Deceased, boarded the train to transport him to San Antonio, Texas, and that at the time he boarded said train he was suffering from lung trouble or consumption, and that this fact was known to him but was not known to the defendant herein, and if you further believe from the evidence that upon arrival at Longview Junction, Texas, on August 10th, 1913, he was still in the same condition with reference to his sickness; and if you further believe from the evidence that upon his changing cars at Longview Junction, at said time, he became soaked with rain and water, as alleged in Plaintiff's Petition, as the result of which he suffered any of the injuries or illnesses alleged in said Petition, and if you further believe from the evidence that said injuries

resulted from the fact that he was in the condition of health that he was at that time, and but for such condition in his health said injuries would not have arisen, then you are instructed to find for the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

## BILL OF EXCEPTION No. 24.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered*, that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"The undisputed evidence in this case shows that at the time J. T. Bigger, Deceased, boarded the train he knew he was a sick man, or had lung trouble or consumption, and that he was aware of this fact. That his condition in this regard was unknown to the defendant in this case. That he was still in this condition when he arrived at Longview Junction, Texas, where he changed cars and where he claims to have gotten wet. If you believe from the evidence that the ills which he suffered since August 10th, 1912, if any, and for which he seeks to recover damages, and claimed to be the result of getting wet in his then condition at Longview, Texas; and if you further believe from the evidence that such results would not have followed had he used ordinary care and by use of such ordinary care would have avoided getting

wet at the time of his getting wet, then you are charged that the ills which he suffered, if any, after August 10th, 1913, were not and could not have been contemplated or foreseen by the defendant, Texas & Pacific Railway Co., and the negligence of said company, if any, was not the proximate cause of such injuries, and you will return a verdict in favor of the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

## BILL OF EXCEPTION No. 25.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered*, that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"If you believe from the evidence that as the train approached Longview Junction its employe passed through the coach thereof, in which J. T. Bigger was a passenger, and announced that all passengers for I. & G. N. points should transfer to another car on said train, and if you further believe that said Bigger, had he exercised that degree of care that an ordinary prudent person, under similar circumstances would have exercised, would have heard such announcement, and that said Bigger was destined to San Antonio, your verdict should be for the Defendants.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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BILL OF EXCEPTION No. 26.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after

all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"If you believe from the evidence that the illness of J. T. Bigger was traceable to his physical condition at the time he transferred from the Texas & Pacific Ry. Co. to the International & Great Northern Ry. Co. in the rain, if you believe it was raining, and you further believe that his condition was not traceable to any natural or proximate result of defendants' negligence, then you will find for the defendant.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the

same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 27.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al

*Be It Remembered,* that on the trial of the above stated cause, on the 8th day of January, 1914, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 2 on Special Charge No. 1, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired as follows:

"You are instructed, that in determining the question of damages it is proper to introduce in evidence, to show the length of lives, tables of mortality, but the jury cannot consider the opinions of witnesses as to the supposed value of services of the decedent, that he

was in line of promotion and would have received greater wages if he had lived; for such items would be speculative; and in considering the amount of damages that could be recovered the jury will not speculate upon matters that are not before them in evidence; and in this case there is no evidence introduced, whatever, of any services performed or any money paid to the deceased since he left Owensboro; nor is there any evidence as to probable length of life of the deceased. As the probable length of life of the deceased is an essential fact to be shown, in the absence of any evidence on this point, the judgment should be for the defendant, as there was not introduced any legal evidence upon which a verdict can be supported.

COBBS, ESKRIDGE & COBBS,
Attorneys for the T. & P. Ry. Co.

Refused.

T. S. MAXEY,
Judge."

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 2.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof

might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc,* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

Filed March 23, 1914.

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## BILL OF EXCEPTION No. 28.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al.

*Be It Remembered,* that on the trial of the above stated cause Plaintiff offered in evidence the deposition of J. T. Bigger, whereupon defendants filed a written motion setting out certain objections thereto. That portions of the deposition of the said J. T. Bigger objected to, including questions and answers of the witness are as follows:

"INTY. 8: When you arrived at said station on said date what orders or commands, if any, were given you by the employe or employes in charge of the defendant Texas & Pacific Railway Company's passenger train with reference to leaving the said train when it came to a stop near Longview? Answer fully."

ANSWER: "When the train arrived at the station in Longview, either the conductor or the Auditor, who was in charge of the train ordered me to leave the train. It was raining in torrents. I told this party that I did not want to get off in the rain and he stated that I would have to get off, because they could not hold the train there on account of the rain. I had two heavy grips and had to get off and take my grips."

INTY. 10: "At said time and place, please state the condition of the ground with reference to whether or not it was wet or dry, and if you state that the ground was wet, then please state fully the extent thereof?"

ANSWER: "The ground was very wet when I got off. There must have been inch or two of water when I had to get off. I had to get off in this water and set my grips off in it. Rain was falling in sheets."

INTY. 11: "If you have answered in response to the foregoing interrogatories that you were ordered and commanded by the defendant Texas & Pacific Railway Company employes to leave said train at said time and place, and that the rain was falling in torrents, and that the ground was covered with water, then please state what you did in response to said command, if you have testified that you were so commanded to leave the train? Answer this question fully, giving all the facts with reference to what you did after you left the train."

ANSWER: "I got off in the rain and took my

two grips and had to walk about one-third the distance of a block before I got to a shelter. I stopped in a place used as a railroad office, I got thoroughly soaked by the rain."

INTY. 13: "If it was raining at the time you left the train, please state whether or not you got wet?"

ANSWER: "I got thoroughly soaked. There did not seem to be a dry thread on me; my shoes were full of water. My suit cases were wet also."

INTY. 14: "If you were commanded to leave the train while it was raining, then please state—about how long you were required to remain in the rain?"

ANSWER: "I was required to remain in the rain a sufficient length of time to walk the distance from the train to the shelter, above referred to in my answers, which was about one-third of a block. With my grips I got along very slowly. I was also compelled to get in the rain again when I got on the I. & G. N. train after leaving the T. & P. train."

INTY. 16: "If you have testified that the clothes that you were wearing at the time and place above mentioned were thoroughly drenched, then please state how long you were required to wear them in such condition, what effect if any, the exposure to the rain and the wearing of these clothes had upon your health?"

ANSWER: "I had to wear the wet clothes from the time I got wet until about 11:30 o'clock that night, when we arrived in San Antonio. Having to wear

the wet clothes and from being in the rain and being exposed, caused me to take a deep cold, from which I have never recovered. About a week after that I had to go to bed and have been in bed practically ever since."

INTY. 17: "If you have stated that you became ill by reason of said exposure then please give in detail said illness, and in this connection you will please state how it effected you, and what suffering if any, was caused thereby?"

ANSWER: "As above stated I took a severe cold, I suffered with soreness in the chest, had aching in the back, and have had chilly sensations all the time since then. I have never recovered from the effects of getting wet, I have suffered a great deal; I have been unable to sleep and have had no appetite."

INTY. 21: "What was your earning capacity on and before August the 10th, 1912?"

ANSWER: "I earned $150.00 per month. I had just finished a six week job in Owensboro, Ky., before I started to San Antonio about the 8th of August, 1912, and made at the rate of $125.00 per month. I got a job in San Antonio out of which I ought to have made $200.00 per month had I been able to have taken it."

INTY. 22: "Please state whether or not since the 10th day of August, 1912, you have been able to perform labor of any kind, if not, why not?"

ANSWER: "I have not been able to perform any

labor of any kind since August 10, 1912. Have been in bed practically ever since."

X INTY. No. 5: "Please state fully and in detail, everywhere you went and every place you stopped from the time you left the city of San Antonio on your alleged trip to Owensboro, Ky., until you returned to said city? Also state the names of people with whom you are acquainted at each and every place where you so stopped?"

ANSWER: "I got on the train at San Antonio and did not stop off until I got to Evansville, Ind. I did not stay long in Evansville, was not there more than an hour. I went to Owensboro. I stopped at the Bell Hotel at Owensboro all the time I was there and I worked for the Ky. Electric Co. I knew the May Lambert, E. P. Frank, R. W. Littell and a great many others. In fact, I knew most of the people in Owensboro. I lived there 14 years."

X INTY. No. 7: "Is it not a fact that a number of passengers got off of the T. & P. train on which you were a passenger at Longview, Texas, and did you not see, or could you not have seen, in which direction the greater number of these passengers moved upon alighting from said train?

ANSWER: "I only saw four passengers get off of the T. & P. train at the time I got off. They all got wet. I saw which way they went, I followed them to the nearest shelter."

Defendant filed its motion in writing, objecting to the same which motion is as follows:

"And now comes the Texas & Pacific Railway Co. for the reasons stated in its former motion, filing this as its additional motion thereto, objects to and moves the Court to strike out the several questions and several answers of the witness J. T. Bigger in his deposition taken in this cases heretofore, and for additional objection comes now and says:

I.

It objects to Interrogatory No. 3, in which the witness is asked to state "what orders or commands, if any, were given you by the employee, or employees in charge of the T. & P. Ry. Co. passenger train with reference to leaving the said train when it came to a stop near Longview, because said question is leading and suggestive and calls for the answer desired, and objects to all that portion of the answer of witness No. 8, which states that the conductor or the auditor in charge of the train ordered him to leave the train, because it does not state any facts or what language was used, and especially objects to all the balance of said answer because the same is not responsive to the question asked and especially that portion of the answer in which he said he "Had two heavy grips and had to get off and take my grips," as not responsive to the question and is a voluntary statement not called for.

II.

Defendant objects to all that part of the answer of witness in his answer to the 10th interropatory, "when I got off*** when I had to get off. I had to get off in this water and set my grips off in it," as

wholly not responsive to the question asked and is a voluntary statement of the witness.

III.

Defendant objects to the whole of interrogatory No. 11, because it is leading and suggestive, and to the entire answer of said witness because it is not responsive to the question and especially all that portion of the answer in which the witness states that he had to take his grips and walk, etc., as wholly not responsive, as immaterial and irrelevant, and an improper answer.

IV.

It moves to strike out that part of the answer of witness to the 13th interrogatory in which he says: "My suit cases were wet also," as not responsive to the question asked and a voluntary statement of the witness.

V.

It objects to interrogatory 14 as leading, suggestive and calling for a conclusion of the witness as not an interrogatory asking statement of facts and objects to the entire answer of the witness for the same reasons, because there are no facts or circumstances stated, requiring the said Bigger to remain in the rain, the same is a voluntary statement, irrelevant and immaterial; is a conclusion of the witness, and further specially objects and moves to strike out all the balance of that answer, towit: "With my grip I got along very slowly. I was also compelled to get in the rain

again when I got on the I. & G. N. train after leaving the T. & P. train," because the same is not responsive to the question, is a voluntary statement, immaterial and irrelevant to any issue in this case and not called for by the question propounded.

VI.

Defendant objects to Interrogatory No. 16, because it is leading, suggestive and calls for the answer desired, is immaterial and irrelevant; and objects to all that part of the answer of the witness, as follows: "caused me to take a bad cold from which I have never recovered," as not responsive to the question, a conclusion and the whole of said answer, and the said question should be stricken out.

VII.

Defendant objects to Interrogatory No. 17, because it is leading, suggestive and calls for a conclusion of the witness and does not call for a statement of facts; and objects to the entire auswer of said witness because the same is not responsive to the question, is a statement or conclusion and not a statement of facts, and said question and answer should be stricken out.

VIII.

Defendant objects to all that part of the answer of said witness to Interrogatory No. 21, in which he states: "I got a job in San Antonio, out of which I ought to have made $200.00 per month had I been able to have taken it," because said answer is a voluntary statement, is an improper answer and states the

conclusion of the witness, and is improper and misleading.

IX.

It moves to strike out that portion of answer of the witness to Interrogatory No. 22, in which he says: "Have been in bed practically ever since," as a voluntary statement, conclusion of the witness and immaterial and irrelevant.

X.

Defendant moves to strike out that part of the answer of witness to Cross Interrogatory No. 5, in which he states: "and I worked for the Kentucky Electric Company," because the same is not responsive to and called for by the question, and is a voluntary statement.

XI.

Defendant objects to that portion of answer of the witness to Cross Interrogatory No. 7, in which he states, "they all got wet," as a voluntary statement not called for by the question and not responsive thereto.

Wherefore, for all of the reasons given aforesaid, defendant prays the judgment of the Court that the same be stricken from the Record; wherefore, etc.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant Texas & Pacific Ry. Co.

The International & Great Northern Railway Co.

comes and joins in the foregoing motion and prays judgment of the Court.

COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant, I. & G. N. Ry. Co."

Portions of said objections were sustained but part overruled by the Court, as follows:

"On this the 6th day of January, 1914, came on to be heard the motion of defendants to quash and strike out certain questions and answers of J. T. Bigger, deceased, and the Court, after hearing the same, granted said motion as to the following:

That part of answer to Interrogatory No. 8, as follows: "had two heavy grips and had to get off and take my grips."

That part of the answer to Interrogatory No. 10 viz: "Where I got off. There must have been inch or two of water where I had to get off. I had to get off in this water and set my grips off in it."

That part of the answer to Interrogatory No. 13, viz: "My suit cases were wet also."

That part of the witness answer to Cross Inty. No. 7 as follows: "They all got wet."

That part of the answer to Interrogatory No. 21, viz: "I got a job in San Antonio, out of which I ought to had made $200.00 per month had I been able to have taken it." Also as to the balance thereof, the Court overruled, to-wit:

All of Interrogatory No. 8 and to the answer to Interrogatory No. 8, exclusive of that portion of the answer as follows: "had two heavy grips and had to get off and take my grips."

The whole of Interrogatory No. 11, and the entire answer thereto, and especially that portion of the answer in which the witness states: "I . . took my two grips and had to walk about one-third the distance of a block," etc.

All of Interrogatory No. 14 and the entire answer thereto, and especially that part of the answer, to-wit: "With my grips I got along very slowly. I was also compelled to get in the rain again when I got on the I. & G. N. train after leaving the T. & P. train."

All of Interrogatory No. 16, and that part of the answer thereto as follows: "caused me to take a bad cold from which I have never recovered."

All of Interrogatory No. 17 and the entire answer of the witness thereto.

That part of the answer to Interrogatory No. 22 as follows: "Have been in bed practically ever since."

That part of the answer of the witness to Cross Interrogatory No. 5, as follows: "and I worked for the Kentucky Electric Company."

And as to which ruling the defendants then and there in open Court excepted.

To which ruling of the Court in not sustaining said objections the defendant then and there in open Court excepted, and now here tenders its said Bill of Exception and prays that it be now here approved and made a part of the record hereof.

Approved *nunc pro tunc* as of January the 8th, 1914.

Dated this 18th day of March, A. D. 1914.

T. S. MAXEY,
Judge.

The above Bill No. 28, is signed with the following qualification and explanation:

The deposition of J. T. Bigger was filed in this Court on March the 31st, 1913. This cause was regularly called for trial during the May term of 1913 of this Court, and upon an application of the defendant, Texas & Pacific Railway Company, the cause was continued, and set for trial on the first Monday in January, 1914, being during the December term of this Court. No objections were filed nor any motion made to any part of said deposition, until January the 5th, 1914, when the defendant filed its motion to quash certain questions and answers in said deposition. The witness, J. T. Bigger, died on February the 28th, 1913, and no objections were filed to the deposition until the date upon which this cause was set for trial, and a term of this Court passed, without any objections being filed.

Signed this ——— day of March, A. D. 1914.

_____
Judge.

Filed March 23rd, 1914.

## PETITION FOR WRIT OF ERROR AND ORDER FIX AMOUNT OF BOND.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, *At Law.*
I. & G. N. Ry. Co. et al.

To the Honorable Judge of Said Court:

The Texas & Pacific Railway Company, Defendant in above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 8th day of January 1914 comes now by its attorneys, whose names are signed hereto, and petitions said Court for an order allowing said Defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security that the Defendant shall give and furnish upon said Writ of Error.

W. L. HALL,
COBBS, ESKRIDGE & COBBS,
Attorneys for Defendant T. & P. Ry. Co.

The foregoing Petition for Writ of Error having been presented to me this the 10th day of February, 1914, the same is allowed. It is further ordered that the Writ of Error bond in this cause be and the same is hereby fixed at the sum of $17,500.00.

T. S. MAXEY,
United States District Judge.

Filed February 11th, 1914.

## ASSIGNMENT OF ERROR.

In the United States District Court Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192 *Law.*
I. & G. N. Ry. Co. et al.

Now comes the Defendant, The Texas & Pacific Railway Company, against whom the judgment was secured in this cause in favor of the Plaintiff, and files the following assignments of error as grounds for reversal of the judgment of the District Court rendered in this case:

### FIRST ASSIGNMENT OF ERROR.

The Court erred in not sustaining the several pleas in writing of the Defendants, which pleas are set forth in the pleading of defendants and which were overruled by the Court, as recited in the judgment of the Court overruling the same, and as further shown by Bill of Exception No. 1 herein, to the effect that said suit was originally and improperly brought in Bexar County against the Texas & Pacific Railway Co. because it had its domicile in the Northern District of Texas in Dallas County, Texas, having no railroad or local agent in Bexar County, its co-defendant alone having such agency. That the suit and service upon said other co-defendants did not justify plaintiff to file the suit in said ·t in said County against the Texas & Pacific Railway Co., which said company was alleged to

have committed a tort and injury to the plaintiff in the Northern District of Texas and there was no valid law that would justify the institution of said suit against the Texas & Pacific Railway Co. and to hold it in said Bexar County and the United States District Court having the same power to pass upon said question of jurisdiction raised by the said defendant, and the privilege of said defendant to be so sued in its own District and the said Court having directed a verdict against all of the defendants in said cause except this defendant, it was for the reason stated error in the Court in not sustaining and dismissing the said Texas & Pacific Railway Co. from said cause, there being no valid law in Texas justifying the action of the Court for the reasons stated and holding said Defendant further in said cause.

## SECOND ASSIGNMENT OF ERROR.

The Court erred in refusing to charge the jury peremptorily to find for the defendant, Texas & Pacific Railway Co., as requested by it in Special Charge No. 1, Bill of Exception No. 2, which is as follows:

"And now comes the Defendant and moves the Court, and request the Court to instruct a verdict for the Defendant, Texas & Pacific Railway Company," because such injuries as plaintiff sues for could not be and were not the direct and proximate result of the injury received by the plaintiff while a passenger on Defendant's train, which resulted in the death of J. T. Bigger.

## THIRD ASSIGNMENT OF ERROR.

The Court erred in its general charge to the jury, which charge was excepted to at said time and the exceptions taken to the said charge at said time, set out in Bill of Exception No. 3, grouping together the first two paragraphs, as follows, towit:

"He has not charged all the law on the question of the duty of a passenger while riding on the train.

Because he has emphasized too much the duties of the carrier."

Because he has extended it to apply after the passenger left the train, when there was no claim that the very highest degree of care was not shown to him while on the train.

## FOURTH ASIGNMENT OF ERROR.

The Court erred in that portion of its General charge, set out in Bill of Exception No. 3, as follows:

"Because the Court has erred in charging the jury that it is the duty of the railroad company to provide adequate accommodations for passengers where they could alight to change cars where they could be protected from the inclemency of the weather: There is no evidence that they did not provide an adequate place for them to alight."

## FIFTH ASSIGNMENT OF ERROR.

The Court erred in that portion of its General charge, set out in Bill of Exception No. 3, as follows:

"Because it was error in the Court to submit to the jury to ascertain if the employees of the defendant required the deceased to get off the train in a severe rain and his illness and death resulted therefrom, without any fault or negligence on his part and plaintiffs would be entitled to recover; because there was no evidence that he was compelled to get off."

## SIXTH ASSIGNMENT OF ERROR.

The Court erred in that portion of its General charge, set out in Bill of Exception No. 3, as follows:

"Because the Court erred in instructing the jury that as a common carrier the duty of the defendant to its passengers on its train did not end by merely stopping the train at Longview Junction; whereas the duty of the railroad, as a common carrier and the relation of passenger ceased when the railroad gave a proper place for the passengers to get off, and that the passenger did get off at a safe place, the duty of the common carrier and the relation of passenger then ceased; and the duty alone was not on the Texas & Pacific to take care of passengers travelling on a through ticket, and the Texas & Pacific had performed its duty in carrying the passenger safely to Longview."

## SEVENTH ASSIGNMENT OF ERROR.

The Court erred in giving the instruction, Special Charge No. 1, asked by Plaintiff, as set out in Bill of Exception No. 4, as follows:

"Gentlemen of the Jury:—

At the request of the Plaintiffs you are instructed as follows:—

The defendant, Texas & Pacific Railway Company, owed to its passengers the duty to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances, and the failure to exercise such degree of care would be negligence."

It was error to give said charge as it was not applicable to this case. While the law requires the highest degree of care to be exxercised by a Railway Company transporting a passenger, that after the said passenger leaves the train it is only required to use, if any, that degree of care which an ordinary prudent person would use or exercise under the same or similar circumstances. There was no duty imposed on the Railway Company of a high degree of care, such as a very prudent person would exercise in protecting a passenger from rain after leaving its train. It had provided for the carrying of an I. & G. N. Ry. Co. chair car attached to its train for the transfer of such passengers.

## EIGHTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 2 set out in Bill of Exxception No. 7, requested by the defendants, as follows:

"If the jury believe from the evidence that the rain and water that J. T. Bigger encountered after leaving the cars of the Texas & Pacific Ry. Co. at Longview, would not have caused said alleged injuries had he not have had the alleged sickness at the time, unknown to defendant, you will find for the Defendant."

## NINTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 3, set out in Bill of Exception No. 8, requested by the defendants, as follows:

"If you believe from the evidence that J. T. Bigger, Deceased, knew or could have ascertained by the use of ordinary care, that there was an International & Great Northern coach attached to the train of cars upon which he travelled from the point he entered which he could have entered at or before reaching Longview, and would have thereby been protected from the rain and would not have gotten wet, and failed to do so, you will find for the defendant."

## TENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give special Charge No. 4, set out in Bill of Exception No. 9, requested by the defendants, as follows:

"Defendant requests the Court to charge the jury, that under the law defendant Railway is charged with the duty of transporting its passengers with a high degree of care while on its train and to stop its train for a sufficient length of time for its passengers to safely alight, alight at a regular station or at the end of their journey. If therefore you find that defendant was guilty of no negligence in transporting J. T. Bigger safely Longview Junction and the train was stopped at its usual place for the station and he was given ample time in which to leave said train, then in such case the defendant would have discharged its duty to plaintiff and you will find for the defendant."

## ELEVENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give special charge No. 5, set out in Bill of Exception No. 10, requested by the defendants, as follows:

"This Defendant discharged its legal duty by safely transporting J. T. Bigger as a passenger at Longview, and is in no wise responsible for the result of any injuries that may have been received from the elements that caused him to get wet after leaving its train of cars at Longview, for when he there left said train the defendant owed no further duty to protect him from an unusual rain-storm, as he had then ceased to be a passenger on defendant's train, having reached the point of destination as a passenger on said road."

## TWELFTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 6, set out in Bill of Exception No. 11, requested by the defendants, as follows:

"If you believe from the evidence that J. T. Bigger was a through passenger to San Antonio, and the ticket or transportation required him to change from the Texas & Pacific Ry. Co. cars at Longview for the International & Great Northern Ry. Co., he was required as a matter of law to leave that train at Longview after its arrival, and he no longer had any legal right after a reasonable time after its arrival to remain on said train, having arrived at his point of destination over the Texas & Pacific Ry. Co. and it was his duty to immediately leave said train at that point for he had no legal right thereon

as a passenger thereafter, unless he desired to become a passenger upon said train and so notified defendant of his purpose, in which case he was required to secure another ticket or pay his way thereon for all rights as a passenger ceased at Longview by virtue of the ticket he purchased, via the International & Great Northern Ry. Co. route, and the defendant had the legal right to order and compel him to leave the train unless he indicated a purpose and desire to continue further as a passenger thereon, by securing a ticket thereon or by paying a cash fare to the place he wished to travel to, and you will so find by your verdict in favor of defendant."

## THIRTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 7, set out in Bill of Exception No. 12, requested by the defendants, as follows:

"I further charge you that you will not consider any damage or any condition of J. T. Bigger that arose from the alleged accident or claimed injuries, unless you find from a preponderance of the evidence that J. T. Bigger did not contribute any way to his condition and in order for plaintiffs to recover, it devolves upon them to show that J. T. Bigger exercised ordinary care and prudence in taking care of himself and that his act and conduct did not contribute to the said injuries, followed in an unbroken sequence from injuries received, resulting from the rain and that the same directly and proximately caused and produced the injury he claims to have received, if any, by reason of the water."

## FOURTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 8, set out in Bill of Exception No. 13, requested by the defendants, as follows:

"If you believe that J. T. Bigger's condition, as alleged, was brought about by reason of his prior condition and acts and conduct thereafter, and that the same would not have occurred except for the result of his own negligence and want of ordinary care, such as no person of ordinary care and prudence would have done, and that the Railroad Company was not guilty of any negligence resulting from its acts, which were the proximate result of his alleged injuries, but was on account of his own carelessness and want of care in taking care of himself, which was the proximate cause of his injuries, you will find for the defendant."

## FIFTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 9, set out in Bill of Exception No. 14, requested by the defendants, as follows:

"At the request of the Defendant, Texas & Pacific Ry. Company, I deliver to you the following special instruction:

J. T. Bigger was bound to use all means reasonably under his control and within his power to take proper care of himself after getting wet at Longview Junction, Texas, if he did get wet as alleged in Plaintiff's Petition, and if you believe from the evidence that it was his duty to have gone to a Hotel or some other place of safety and where he could have gotten dry clothing, or if you believe from the evidence that it was his duty to have had dry cloth-

ing with him, and he could have changed them on the train and thereby saved him from the alleged injury, or if you believe that after reaching San Antonio if he had within reasonable time, called in a physician and taken proper treatment, that he would have recovered from the injuries resulting from getting wet, if any, and if you further believe that he did not do any of these things and that in not so doing he was not acting as an ordinary prudent person would have acted, then you are charged that Plaintiffs cannot recover and your verdict should be for the Defendant."

## SIXTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 10, set out in Bill of Exception No. 15, requested by the defendants, as follows:

"At the request of the defendant, the Texas & Pacific Railway Company, I submit to you the following special charge:

If you believe from the evidence that at the time J. T. Bigger, Deceased, boarded the train for passage to San Antonio, Texas, as alleged in the Petition, that he was suffering from lung trouble or consumption, and that he knew this fact, and if you further believe from the evidence that such fact was not brought to the knowledge of the defendants herein, or any of them, and if you further believe from the evidence that the said Bigger did not provide himself with a change of clothing and carry same along and that such failure was negligence on his part, and that an ordinary prudent person under similar circumstances would have secured same before continuing the trip, and if you further believe from the

evidence that he, in changing cars at Longview Junction, Texas, became soaked with rain or water, as alleged in his Petition, and if you further believe from the evidence that an ordinary prudent person under similar circumstances would have ascertained before reaching Longview Junction, that a through San Antonio coach was in the train on which he was a passenger, or if you find from the evidence that an ordinary prudent person, under similar circumstances, would have, after getting wet, taken care of himself by providing himself with a change of dry clothing or by going to a hotel or some place of shelter and not proceeding on his journey, as he did; and if you further believe from the evidence that the getting wet in his then physical condition resulted in any way of the injuries alleged in their Petition, and that he would not have suffered such injuries except for having been in said physical condition at the time of so getting wet; or if you believe from the evidence that if he had had a dry change of clothing to have immediately put on, or that if he had gone to a hotel or some other place of shelter and not proceeded on the journey, he would have avoided suffering the injuries that it is claimed he suffered, then you are charged that plaintiffs are not entitled to compensation for such injuries as against the defendant herein and your verdict should be for the defendant."

SEVENTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 11, set out in Bill of Exception No. 16, requested by the defendants, as follows:

"If you believe from the evidence that at the

time J. T. Bigger, Deceased, boarded the train, if you believe he did so board said train, for passage to San Antonio, Texas, that he was then suffering from lung trouble and that he knew this fact, but that the defendant did not know of same, and if you further believe from the evidence that when said train reached Longview Junction that he, through the negligence of the defendants, or either of them, became soaked with rain and water as alleged in his Petition, which said getting wet caused or resulted in any of the injuries or illnesses complained of in Plaintiff's Petition, and if you further believe from the evidence that such injuries and illnesses would not have occurred except for the fact that the said J. T. Bigger was at said time sick, as hereinabove stated, then you are charged that the plaintiffs cannot recover and your verdict should be for the defendants, and you will so find."

## EIGHTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 12, set out in Bill of Exception No. 17, requested by the defendants, as follows:

"Defendant Texas & Pacific Ry. Co. further requests the Court to instruct a verdict for it without prejudice, to sue elsewhere, because the evidence shows this suit was brought in this court by an amended pleading filed herein on the 16th day of May 1913, by the plaintiffs, as surviving widow and children of the said J. T. Bigger, who died after said suit was instituted and said cause of action abated with his death and this court was without jurisdiction to proceed further with this suit, as the Texas & Pacific Ry. Co. is a corporation not in this juris-

diction, defendant having already excepted to said jurisdiction."

NINETEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 13, set out in Bill of Exception No. 18, requested by the defendants, as follows:

"Defendant requests the Court to charge the jury that the evidence of all persons and witnesses who swore in this case, in the employment of the Railroad Company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. That the jury should regard the testimony of every witness sworn of defendant, but it is their duty to give to the evidence of witnesses the weight to which in their opinion, as conscientious men seeking the truth, they believe it is entitled to and that the employment and business of a witness affords no reason why such evidence should arbitrarily, or without reason, be disregarded."

TWENTIETH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 14, set out in Bill of Exception No. 19, requested by the defendants, as follows:

"The law requires all railroad companies in this State to provide and maintain adequate, comfortable and clean depots and depot building at their several stations, for the accommodation of passengers, and to keep said depot buildings well lighted and warm for the comfort and accommodation of the travelling public. If therefore, the jury shall

believe that there were sufficient depot and other buildings at Longview Junction to comply with the law and if they should further believe from the evidence that there were sufficient depot and buildings at Longview Junction, Texas, to shelter passengers and to protect them from the rain while waiting for trains, defendant would not be liable for any injury claimed as the result of his getting wet from rain, as testified to, which fell on him in transferring from the train of the Texas & Pacific Railway Co. to the train of the International & Great Northern Railway Co. at Longview Junction, where the journey upon the Texas & Pacific Railway line terminated, if the jury should believe he was transferred with safety and care from Texarkana to Longview and sufficient time given him on the arrival of said train at the termination of his journey over the line of the Texas & Pacific Railway Company, to get off said train at Longview Junction to take the train of the International & Great Northern Ry. Co. from Longview to San Antonio."

TWENTY-FIRST ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 15, set out in Bill of Exception No. 20, requested by the defendants, as follows:

"Defendants requests the Court to charge the jury that the cars of the railroad company are not hospitals nor their employes nurses. Persons who are ill have a right to enter the cars of the Railroad Company and travel therein; as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from conditions affecting their fitness to journey, where they are unknown to defendant, must rest upon the shoul-

ders of the plaintiff and in rendering your verdict you will give full consideration to all of the facts and circumstances connected with the said J. T. Bigger and his conduct from the time he entered said car until he left the same as bearing upon issues as to whether or not he exercised that care and prudence which an ordinary prudent person under similar circumstances would have exercised, and if you find that he did not exercise ordinary care and prudence under the circumstances and believe that his act and conduct contributed to his condition, you will find for the defendant."

TWENTY-SECOND ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 16, set out in Bill of Exception No. 21, requested by the defendants, as follows:

"The Defendant requests the Court to charge the jury that if they believe from the evidence that the condition of J. T. Bigger when he entered the cars for a trip to San Antonio, was sick and that he knew at that time his condition of health was such as to increase the chances of injury to him by exposure and in such condition that he failed to use care and prudence to avoid exposure, and that his condition was well known to him and not known to defendant at the time, and that but for his condition at that time and at the time he changed cars, and he knew of his condition, that defendant would not be responsible for any injury that might result to the plaintiff in the transferring from the Texas & Pacific Ry. cars, to the International and Great Northern Ry. cars, unless you should believe that such injury would have resulted to him independent of the fact as to whether or not he was sick, and in arriving

at your verdict you will consider all the facts and circumstances in connection with his condition and then determine whether or not he used that ordinary care and prudence which an ordinary person would have exercised under similar circumstances."

TWENTY-THIRD ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 17, set out in Bill of Exception No. 22, requested by the defendants, as follows:

"If you believe from the evidence that the illness of J. T. Bigger, Deceased, was traceable to his physical condition at the time he transferred from the Texas & Pacific Ry. Co. to the International & Great Northern Ry. Co. in the rain before the got wet, if you believe it was raining, and you further believe that his alleged injury and complaint was not traceable to the proximate result of defendants' negligence but to his own want of ordinary care which contributed to and was the proximate result of his condition at the time, you will find for the defendant."

TWENTY-FOURTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 18, set out in Bill of Exception No. 23, requested by the defendants, as follows:

"If you believe from the evidence that on August —— 1913, J. T. Bigger, Deceased, boarded the train to transport him to San Antonio, Texas, and that at the time he boarded said train he was suffering from lung trouble or consumption, and that this fact was known to him but was not known to the defendant herein, and if you further believe from

the evidence that upon arrival at Longview Junction, Texas, on August 10th, 1913, he was still in the same condition with reference to his sickness; and if you further believe from the evidence that upon his changing cars at Longview Junction, at said time, he became soaked with rain and water, as alleged in Plaintiff's Petition, as the result of which he suffered any of the injuries or illnesses alleged in said Petition, and if you further believe from the evidence that said injuries resulted from the fact that he was in the condition of health that he was at that time, and but for such condition in his health said injuries would not have arisen, then you are instructed to find for the defendant."

TWENTY-FIFTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 19, set out in Bill of Exception No. 24, requested by the defendants, as follows:

"The undisputed evidence in this case shows that at the time J. T. Bigger, Deceased, boarded the train he knew he was a sick man, or had lung trouble or consumption, and that he was aware of this fact. That his condition in this regard was unknown to the defendant in this case. That he was ill in this condition when he arrived at Longview Junction, Texas, where he changed cars and where he claims to have gotten wet. If you believe from the evidence that the ills which he suffered since August 10th, 1912, if any, and for which he seeks to recover damages, and claimed to be the result of getting wet in his then condition at Longview, Texas; and if you further believe from the evidence that such results would not have followed had he used ordinary care and by use of such ordinary care

would have avoided getting wet at the time of his getting wet, then you are charged that the ills which he suffered, if any, after August 10th, 1913, were not and could not have been contemplated or foreseen by the defendant, Texas & Pacific Railway Co., and the negligence of said company, if any, was not the proximate cause of such injuries, and you will return a verdict in favor of the defendant."

TWENTY-SIXTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 20, set out in Bill of Exception No. 25, requested by the defendants, as follows:

"If you believe from the evidence that as the train approached Longview Junction its employee passed through the coach thereof, in which J. T. Bigger was a passenger, and announced that all passengers for I. & G. N. points should transfer to another car on said train, and if you further believe that said Bigger, had he exercised that degree of care that an ordinarily prudent person, under similar circumstances would have exercised, would have heard such announcement, and that said Bigger was destined to San Antonio, your verdict should be for the Defendants."

TWENTY-SEVENTH ASSIGNMENT OF ERROR

The Court erred in refusing to give Special Charge No. 21, set out in Bill of Exception No. 26, requested by the defendants, as follows:

"If you believe from the evidence that the illness of J. T. Bigger was traceable to his physical condition at the time he transferred from the Texas & Pacific Ry. Co. to the International & Great Northern Ry. Co. in the rain, if you believe it was raining,

and you further believe that his condition was not traceable to any natural or proximate result of defendants' negligence, then you will find for the defendant."

TWENTY-EIGHTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 22, set out in Bill of Exception No. 27, requested by the defendants, as follows:—

"You are instructed, that in determining the question of damages it is proper to introduce in evidence, to show the length of lives, tables or mortality, but the jury cannot consider the opinions of witnesses as to the supposed value of services of the decedent, that he was in line of promotion and would have received greater wages if he had lived; for such items would be speculative; and in considering the amount of damages that could be recovered the jury will not speculate upon matters that are not before them in evidence; and in this case there is no evidence introduced, whatever, of any services performed or any money paid to the deceased since he left Owensboro; nor is there any evidence as to probable length of life of the deceased. As the probable length of life of the deceased is an essential fact to be shown, in the absence of any evidence on this point, the judgement should be for the defendant, as there was not introduced any legal evidence upon which a verdict can be supported."

TWENTY-NINTH ASSIGNMENT OF ERROR.

The Court erred in overruling the defendants written motion to quash portions of the deposition of J. T. Bigger as set out therein and shown in Bill of Exception No. 28.

## THIRTIETH ASSIGNMENT OF ERROR.

The error of the trial Court, throughout the case, consisted in the fact that the Railroad owed the very highest degree of care to said passengers and not holding it was discharged in this case:

(1). By transporting him safely to Longview, and for the convenience of passengers, by carrying the International & Great Northern Ry. chair car to I. & G. N. points, which stood in lieu of sheds, etc., at the point of transfer.

(2nd). And in holding and charging that the duty to passengers was not discharged by carrying said chair car into which the passengers were to transfer, to the I. & G. N. Ry. Co. line at or before Longview, but likewise require it to provide other accommodations for passengers for Longview "where they could alight to change cars and where they could be protected from the inclemency of the weather," notwithstanding a safer way was provided on the train itself, of which J. T. Bigger failed to take advantage of.

## THIRTY-FIRST ASSIGNMENT OF ERROR.

The verdict was not only contrary to the law and the evidence but the same was highly excessive by reason of his diminished capacity to earn money on account of his consumption, for the amount given the widow and all children as well, as it could never have been earned by the sick man in the future.

THIRTY-SECOND ASSIGNMENT OF ERROR.

It was clearly established by the evidence prior to the time he got wet he had been a sick man and was compelled to leave Owensboro to make his home in San Antonio and having gone to Kentucky, was returning to San Antonio on a train having sleepers therein, got in a Texas & Pacific coach when an I. & G. N. coach was attached for passengers for I. & G. N. points, riding therein practically a day and night, ignoring trainmen's calls to transfer on the train, or see or look for himself, which would have protected him from the rain and his failing to look out or care for himself, which if he had done he would have been able to transfer to the I. & G. N. car and saved himself from getting wet, and his own negligence in not so looking out for himself and his want of care as a matter of law in not so doing was the proximate cause of his getting wet and of his death.

THIRTY-THIRD ASSIGNMENT OF ERROR.

Because the Court erred in allowing Dr. E. P. Dougherty to testify over the objection of defendant as set out in Bill of Exception No. 6.

THIRTY-FOURTH ASSIGNMENT OF ERROR.

Because the Court erred in allowing Mrs. Ludie Bigger to testify over the objection of defendant as set out in Bill of Exception No. 5.

THIRTY-FIFTH ASSIGNMENT OF ERROR.

It was error for the Court to charge the jury that the Railway Company owed more than the very highest duty to passengers to transport them safely

on the train, it did not owe any other duty than of ordinary care to its passengers in providing a safe way for them to transfer from its train, on a through ticket to a car carried for that purpose in its train, provided for through passengers changing to the connecting line while on the tarin; or to use more than ordinary care in providing a suitable place for passengers leaving said train at the end of their journey to alight at the depot, and in respect thereto it was error to hold the railway responsible to the highest degree of care to erect shelters to protect such transferring passengers from rain when a safer way was provided to transfer to a suitable I. & G. N. car in transit; and in not holding the Railway Company had discharged its duty, without imposing upon it an additional burden of providing sheds for passengers to walk under, from the train.

Wherefore your petitioner prays that the Honorable Court of Appeals will herein consider the foregoing assignments of error, and will adjudge and decree that the said verdict and judgment thereupon to be wrong, and will reverse the same, and send the case back to the United States District Court with instructions to proceed in accordance with its opinion. If the Court shall not reverse said cause, and will follow the Texas statute governing the Appellate Courts in said State, that then this Honorable Court will exercise its power and authority to reduce said judgment, which is unreasonably excessive.

W. L. HALL,
COBBS, ESKRIDGE & COBBS,
Attorneys for Texas & Pacific Railway Co.

Filed February 27, 1914.

## WRIT OF ERROR.

In the United States District Court, Western District of Texas, San Antonio Division.

J. T. Bigger

vs. No. 192 *Law.*

I. & G. N. Ry. Co. et al.

United States of America, ss.:
The President of the United States:

To the Honorable the Judges of the District Court of the United States for the Western District of Texas—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the Texas & Pacific Railway Co., Plaintiff in Error, and J. T. Bigger, et al., Defendants in Error, manifest error hath happened, to the great damage of the said Texas & Pacific Railway Co., Plaintiff in Error, as by its complaint appears.

We being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be herein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana,

within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals, may cause further to be done herein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 27 day of February, in the year of our Lord one thousand nine hundred and fourteen.

(Seal) D. H. HART,
Clerk District Court of the United States for the Western District of Texas.

Allowed Feby. 27, 1914.

T. S. MAXEY,
United States District Judge.

Filed February 27, 1914.

## BOND.

In the United States District Court for the Western District of Texas, at San Antonio.

J. T. Bigger
vs. No. 192, *At Law.*
International & Great Northern Railway Company, Texas and Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company.

Know all men by these presents: That we, the Texas & Pacific Railway Co., as principal, and as sureties are held and firmly bound unto J. T. Bigger, plaintiff, in the sum of seventeen thousand-five hundred ($17,500.00) dollars to be paid to the said J. T. Bigger, plaintiff, his certain attorneys, executors, administrators or assigns, which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seal and dated this the —day of——in the year of our Lord, one thousand nine hundred and fourteen.

Whereas, lately at a session of the United States District Court for the Western District of Texas, at San Antonio, Texas, in said suit, No. 192, at law, between J. T. Bigger, plaintiff, and the International & Great Northern Railway Co., and the Texas & Pacific Railway Company, and the St. Louis, Iron Mountain & Southern Railway Co., defendants, a judgment was rendered against the Texas & Pacific Railway Co. on the verdict of the jury for fifteen thousand-two hundred and fifty ($15,250.00) dollars, with six per cent interest from date of judgment, which judgment is substantially as follows:

On this the 6th day of January, A. D. 1914, came

on to be called for trial the above numbered and entitled cause in its regular order upon the docket, and thereupon came the plaintiffs, and the defendants, and announced ready for trial, and then came a jury of twelve good and lawful men, to-wit: R. A. Holland, and eleven others, who after being duly tried, empaneled and sworn in said cause, heard the pleadings, the evidence, the argument of counsel and the charge of the Court, and thereupon retired to consider its verdict, and thereafter, to-wit: on the 8th day of January, A. D. 1914, returned into open Court the following verdict to-wit:

"To Hon. Judge Maxey,
Western District of Texas, San Antonio, Division.
Sir:

We the jury find in favor of the two defendants, the St. Louis, Iron Mountain & Southern Railway Company and the International & Great Northern Railway Company and further find in favor of the plaintiffs and against the defendant, Texas & Pacific Ry. Co., and assess the aggregate amount of damage at $15,250.00.

Of the amount of damages so found, we award first to the plaintiff, Ludie Bigger, the sum of $5000.00; second to Charles H. Bigger, the sum of $1000.00; third, to James M. Bigger, the sum of $1250.00; fourth, to Ruth H. Bigger, the sum of $2000.00, (two thousand dollars); fifth, to Lucy F. Bigger, the sum of two thousand dollars ($2000.00); sixth, to Virginia G. Bigger, the sum of two thousand dollars ($2000.00); seventh, to Robert L. Bigger, the sum of two thousand dollars ($2000.00).

R. A. HOLLAND,
Foreman."

which said verdict was duly received, read in open

Court to the jury, who announced that it was their verdict, and said verdict was thereupon approved by the Court and ordered to be filed, and judgment is now rendered thereon.

It is, therefore, ordered, adjudged and decreed by the Court that the plaintiff, Ludie Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Five-Thousand ($5000.00) Dollars; that the plaintiff, Charles H. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of one-thousand ($1000.000) Dollars; that the plaintiff, James M. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of One-Thousand Two-Hundred and Fifty ($1250.00) Dollars; that the plaintiff, Ruth H. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Two-Thousand ($2000.00) Dollars; that the plaintiff, Lucy F. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Two-Thousand ($2000.00) Dollars; that the plaintiff, Virginia G. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Two-Thousand ($2000.00) Dollars; and that the plaintiff, Robert L. Bigger, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of Two-Thousand ($2000.00) Dollars, and that all of the above sums of money, bear interest from the 8th day of January, A. D. 1914, at the rate of six per cent per annum, and that plaintiffs recover all costs in this behalf expended, for all of which let execution issue.

It is further ordered, adjudged and decreed by the Court that the plaintiffs take nothing as to the de-

fendants, International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, and that said defendants go hence without day and recover of plaintiffs all costs in their behalf expended, for which execution may issue, to all of which the defendant, the Texas & Pacific Railway Company by its attorney in open Court excepted.

Now, the condition of the above obligation is such that if the said Texas & Pacific Railway Co. shall prosecute its said Writ of Error with effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

By W. L. HALL, Its Agent.
R. H. STEWART,
C. R. SUDDY.

Approved Feby. 27, 1914.

T. S. MAXEY,
Judge.

STATE OF TEXAS,
County of Dallas. February 16, 1914.

I, Louis Maynard, Clerk of the United States District Court, Northern District of Texas, do hereby certify that in my opinion the sureties on the within bond are good and ample security for the amount thereof; and I further certify that should a bond be offered me in the sum of $1750.00 with said parties as sureties, for my approval and acceptance, I would approve and accept same.

LOUIS C. MAYNARD.
Clerk, U. S. District Court, N. D., Texas.

Filed February 27, 1914.

## CITATION IN ERROR.

In the United States District Court Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192, *Law.*
I. & G. N. Ry. Co. et al.

United States of America, ss.:
The President of the United States:

To J. T. Bigger, et al., Defendants in Error; Carter & Fellbaum, Their Attorneys of Record, All of Whom Reside in Bexar County, Texas:—Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit to be held at the city of New Orleans, in the State of Louisiana, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Texas, wherein the Texas & Pacific Railway Company is plaintiff in error, and J. T. Bigger, et al are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 27 day of February, A. D. 1914.

Signed, the 27 day of February, A. D. 1914.

(Seal) T. S. MAXEY,
United States District Judge.

Attest:

D. H. HART,

Clerk.

We hereby waive service of the above citation in Error and accept service, this 16th day of March, 1914.

FELLBAUM & CARTER.

Filed February 27, 1914.

## DEFENDANT IN ERROR PRAECIPE FOR CERTAIN PLEADINGS &C. TO BE PRINTED IN RECORD.

In the United States District Court Western District of Texas, San Antonio Division.

J. T. Bigger
vs. No. 192 *Law*
I. & G. N. Ry. Co. et al.

To the Clerk of said Court:

We request that the following papers be included in the printed record:

I.

Petition page 24 transcript and bond page 28 transcript for removal from the State Court to the Federal Court.

II.

Order of Court continuing cause in the Federal Court on application of Defendant, T. & P. Ry. Co.

III.

All special charges asked by defendant and given by the Court.

IV.

All pleadings of defendants.

V.

All motions of defendants to quash depositions of J. T. Bigger.

VI.

Defendant in Error's Praecipe for papers to be printed in record.

FELLBAUM & CARTER,
Attorneys for Defendant in Error.

Filed March 16th, 1914.

## CLERK'S CERTIFICATE.

The United States of America,
Western District of Texas.,

I, D. H. Hart, Clerk of the District Court of the United States, in and for the Western District of Texas, hereby certify that the foregoing on 300 pages, from 1 to 300 inclusive, is a true and correct transcript of proceedings had and orders entered as therein stated, in cause No. 192 Law, J. T. Bigger, vs. International & Great Northern Railway Company, et al., as the same appears on file and of record in this office, except that the original Writ of Error and Citation in Error are included at pages 291-292 and 297-298 herein, instead of copies thereof.

Witness my official signature and the seal of the said District Court, at office in the City of San Antonio, Texas, this the 8th day of May, A. D. 1914. 1914.

D. H. HART,
Clerk.

(Seal)

By A. I. Campbell, Deputy.

And that thereafter, to-wit, on the eleventh day of July, A. D., 1914, a supplemental transcript of the record of said cause was filed, as follows:

*Supplemental Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2648.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
J. T. BIGGER et al., Defendants in Error.

Error to the District Court of the United States for the Western District of Texas.

[Original record filed July 11, 1914.]
U. S. Circuit Court of Appeals. Filed Sept. 12, 1914. Frank H. Mortimer, Clerk.

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Proceedings in District Court of Bexar County, Texas:


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*Petition for Removal.*

In the District Court of Bexar County, Texas, 57th Judicial District.

No. B, 4936.

J. T. BIGGER
versus
THE TEXAS & PACIFIC RY. CO., INTERNATIONAL & GREAT NORTHERN RY. CO., & ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.

Petition for Removal.

The petition of the Texas & Pacific Railway Company respectfully shows to the Court:

First. That the Texas & Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the laws of the United States, to-wit: "An Act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes", approved March 3, 1871, and

Acts amendatory thereof and supplemental thereto, including an Act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railroad Company was changed to "The Texas & Pacific Railway Company".

Second. That the above entitled action was commenced in the above named Court on the 5th day of December, A. D. 1912, and citation issuing therein was served upon this Defendant on the 15th day of January, A. D., 1913, which said citation is returnable on the first Monday in February, A. D. 1913, it being the 3rd day of February and this defendant is not, and will not be required, by the laws of the State of Texas, or the rule of this Court, to answer or plead to the petition of the plaintiff before the 4th day of February, A. D. 1913.

Third. That the matter in dispute in this case exceeds, exclusive of interests and costs, the sum or value of Three Thousand Dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth: that this action was brought by the plaintiff J. T. Bigger against the Texas & Pacific Railway Company, a Federal Corporation, the International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company and filed in the District Court of Bexar County, Texas, 57th Judicial District of Texas, wherein he sues for $30,000.00 for personal injuries, and in which petition he avers that on or about July 18, 1912, he purchased from the ticket agent of the International & Great Northern Railway Company at San Antonio, Texas, a through, round-trip ticket over said line and its connecting lines, the lines of the Texas & Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, from San Antonio, Texas, to Owensboro, Kentucky and return; that on August 10th, 1912, while returning on the line of the Texas & Pacific Railway Company, he was commanded to alight in a heavy rain to change cars: that there was a through car to San Antonio of which the carrier failed to advise plaintiff and that it was negligence to command and cause plaintiff to alight in the rain and as a result thereof plaintiff contracted a severe illness, and is a helpless invalid, to his damage Thirty Thousand ($30,000.00) Dollars as appears from Plaintiff's Petition, which is referred to for a more particular statement of the cause of action. That this suit against this Defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this Defendant, and under which it was incorporated that is to say, the said Act of Congress of the United States, approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes", and Acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872; March 3, 1873, and June 22, 1874.

Fourth. That the above entitled action is a civil suit arising under the laws of the United States of which the District Court of the United States for the Western District of Texas is given original jurisdiction by Act of Congress approved March 3, 1911, to-wit:

An act entitled "An Act to codify, revise and amend the laws relating to the judiciary, designated as the judicial code."

Your petitioner herewith presents and files a good and sufficient bond, conditioned that it will enter and file in the District Court of the United States for the Western District of Texas, within thirty days from the date of filing this petition, a certified copy of the record in this action, and for paying all costs that may be awarded by said District Court if said Court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner, therefore prays the said Court to accept said petition and bond, and remove this cause to the District Court of the United States for the Western District of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By W. L. HALL, *Att'y for T. & P. Ry. Co.*

The International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, being the only other defendants joined in this suit with the Texas & Pacific Railway Company, acting through their attorneys hereby join the Texas & Pacific Railway Company in its petition for removal, and hereby consent to said removal.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,
By COBBS, ESKRIDGE & COBBS, *Attorneys.*
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.,
By GUINN & McNEILL & R. G. CATER, *Attorneys.*

THE STATE OF TEXAS,
*County of Dallas:*

R. E. Williams, being duly sworn, says that he is the agent of the Texas & Pacific Railway Company, being the Auditor of said Company; that the said The Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States, that he has read the foregoing petition and knows the contens thereof; that the facts therein stated are true.

R. E. WILLIAMS.

Sworn to and subscribed before me, this 23rd day of January, A. D. 1913.

[SEAL.]

E. M. BECKWITH,
*Notary Public, Dallas County, Texas.*

Filed 3rd day of February, A. D. 1913, Andreas Coy, Jr., Clerk District Court, Bexar County, Texas. By A. B. Kliefoth, Deputy.

*Bond for Removal.*

In the District Court of Bexar County, Texas, 57th Judicial District.

No. B. 4936.

J. T. BIGGER
vs.
THE TEXAS & PACIFIC RY. Co. et al.

Know All Men by These Presents, That The Texas & Pacific Railway Company, as principal, and —— —— and —— —— as sureties, are held and firmly bound unto J. T. Bigger in the penal sum of Five Hundred Dollars, for the payment whereof, well and truly to be made, unto the said J. T. Bigger, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that,

Whereas, the said, The Texas & Pacific Railway Company, has filed its petition in the District Court of Bexar County, for the removal of a certain cause therein pending wherein J. T. Bigger is plaintiff, and The Texas & Pacific Railway Company; International & Great Northern Ry. Co., St. Louis Iron Mountain and So. Ry. Co., are Defendants said cause being numbered upon the docket of said Court as No. B. 4936 to the District Court of the United States for the Western District of Texas.

Now, Therefore, if the said The Texas & Pacific Railway Company shall enter in said District Court of the United States for the Western District of Texas, a certified copy of the record in said suit within thirty days from the date of the filing of said petition, and shall pay all costs which may be awarded by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise of full force and effect.

Witness our hand and Seal, this — day of January, A. D. 1913.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By W. L. HALL, *General Att'y.*
J. H. ARDREY.
C. R. BUDDY.

Approved this 3rd day of Feby., A. D. 1913.

R. B. MINOR,
*Judge District Court, 57th Judicial District.*

Filed 3rd day of February, A. D. 1913, Andreas Coy, Jr., Clerk District Court, Bexar County, Texas. By A. B. Kliefoth, Deputy.

*Order for Removal.*

In the District Court, 57th Judicial District, Bexar County, Texas.

No. B. 4936.

J. T. BIGGER

vs.

I. & G. N. RY. Co. et al.

Order for Removal.

This cause coming on to be heard upon application of Defendants herein, for an order transferring said cause to the United States District Court for the Western District of Texas, and it appearing to the court that the Defendants have filed their petition for such removal, which is in due form of law, and further, have filed their bond, duly conditioned with good and sufficient sureties, as provided by law, and it appearing to the court that this is proper cause for removal to the said United States District Court.

Now, therefore, it is Ordered and Adjudged that this cause be, and the same is, hereby, removed to the United States District Court for the Western District of Texas, and the Clerk is hereby directed to make up the Record in said cause, for transmission to said Court forthwith.

Done in open Court this 13th day of February, A. D. 1913.

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Page —.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. —.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

J. T. BIGGER et al., Defendants in Error.

It is hereby agreed that the foregoing copies of the Petition for Removal, Bond for Removal and Order for Removal are true and correct copies of the originals filed in the above styled cause in the State District Court and in the United States District Court for the Western District of Texas, San Antonio, Division, and it is hereby further agreed that the same may be filed in the United States Circuit Court of Appeals, Fifth Circuit, and be a part of the transcript in the above styled and numbered cause.

Signed this the 29th day of June, A. D. 1914.

COBBS, ESKRIDGE & COBBS,
*Attorneys for Plaintiff in Error,*
*The Texas and Pacific Railway Company.*
H. C. CARTER,
PERRY J. LEWIS,
FELBAUM & CARTER,
*Attorneys for Defendants in*
*Error, J. T. Bigger et al.*

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

*Argument and Submission.*

Extract from the Minutes of November 12th, 1914.

No. 2648.

TEXAS & PACIFIC RAILWAY COMPANY
versus
J. T. BIGGER et al.

On this day this cause was called, and, after argument by T. D. Cobbs, Esq., for plaintiff in error, and P. J. Lewis, Esq., for defendants in error, was submitted to the Court.

*Opinion of the Court.*

Filed December 9th, 1914.

United States Circuit Court of Appeals, Fifth District.

No. 2648.

TEXAS & PACIFIC RAILWAY COMPANY
v.
J. T. BIGGER et al.

Error to the United States District Court for the Western District of Texas.

Before Pardee and Walker, Circuit Judges, and Call, District Judge.

By the COURT:

We find none of the assignments of error in this case well taken. With regard to excessive damages see Alpha Portland Cement Co., vs. Curzi, 211 F. 580-587, and cases there cited.

The judgment of the District Court is

Affirmed.

*Judgment.*

Extract from the Minutes of December 9th, 1914.

No. 2648.

TEXAS & PACIFIC RAILWAY COMPANY
versus
J. T. BIGGER et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, R. H. Stewart and C. R. Suddy, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

*Petition for Rehearing.*

Filed December 26th, 1914.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2648.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
J. T. BIGGER et al., Defendants in Error.

And now comes your petitioner and prays that this Honorable Court will reconsider its opinion in this case and grant it a rehearing and reverse said cause for the following reasons, towit:

I.

In not sustaining the first Assignment of Error to the effect that said suit as to this defendant was improperly brought in Bexar County, where it had no line of railroad, residence or local agent, but had its residence and General offices in Dallas County, Texas.

II.

In not sustaining its Second Assignment of Error, because your petitioner under all the evidence as was shown, was entitled to an instructed verdict in its favor.

III.

In not sustaining the Third Assignment of Error because of the error of the court in not charging correctly and properly the duty of the passenger in respect to his duty and proper care while a passenger riding on said train, but emphasized too much the duties of the carrier, and extended that duty to apply as to the degree of care of the railway to the passenger after he had alighted from the train, the same as though a passenger on the train.

IV.

In not sustaining the *Third* Assignment of Error, for the undisputed evidence showed that petitioner furnished "adequate accommodations for passengers to alight to change cars" at Longview.

V.

In not sustaining the Fifth Assignment of Error, for it was error in submitting to the jury the question as to whether or not petitioner forced and compelled Bigger to leave the train, for the undisputed evidence showed to the contrary and such charge was misleading and prejudicial to the jury for it emphasized a fact that which, under the evidence in this case, was improper to submit to the jury.

VI.

In not sustaining the Sixth Assignment of Error, in instructing the jury the carriers duty was not discharged by stopping the train at Longview Junction; for stopping the train at a proper and safe place to get off, was a full compliance with that high degree of care it owed Bigger as a passenger on the train. After Bigger left the train, this petitioner owed him no duty of high degree of care to protect him from rain and getting wet.

VII.

In not sustaining the Seventh Assignment of Error,—for while a carrier owes the very highest degree of care in transporting a passenger while on its train, it does not owe the same degree of care to a passenger after leaving the train to protect him from the rain, only ordinary care in preparing depot and grounds.

VIII.

In not sustaining the Eighth Assignment of Error, for if he was sick with consumption unknown to the Railway, when he left the train, and but for his said sickness the rain would not have hurt him, then railway would not have been responsible.

IX.

In not sustaining the Ninth Assignment of Error, to the effect if Bigger knew or could have ascertained by the use of ordinary

care there was an I. & G. N. coach attached to the train upon which he travelled from the point he entered the train in which he could have entered and ridden, on or before reaching Longview, which would have protected him from the rain and he would not have gotten wet the company would not be liable for his negligence and want of care in taking the safer course.

X.

In not sustaining the Tenth Assignment of Error to the effect that the undisputed evidence showed that the said Bigger was transported without injury by your petitioner from the place he entered said train to Longview, and whatever injury received was by getting wet after he left the train at the depot in crossing over the grounds of one of the railways, not shown which.

XI.

In not sustaining the Eleventh Assignment of Error, to the effect that the said Railway did not owe him any duty, certainly any high degree of care, to prevent the rain from falling on him and wetting him after he left its train to get on the I. & G. N. train.

XII.

In not sustaining the Twelfth Assignment of Error that the ticket of Bigger required him to leave the train at Longview within a reasonable time after his arrival there and no legal right on said train by virtue of said ticket, thereafter.

XIII.

In not sustaining the Thirteenth Assignment of Error to the effect not to consider any injuries of the said Bigger unless they find from the preponderance of the evidence he did not contribute in any way to his condition and in order to recover it devolved upon them to show that Bigger exercised ordinary care and prudence in taking care of himself and that his act and conduct did not contribute to the said injuries, followed in an unbroken sequence from injuries received, resulting from the rain and that the same directly and approximately caused and produced the injury they claimed he received if any, by reason of the water.

XIV.

In not sustaining the Fourteenth Assignment of Error to the effect that if Bigger's condition was brought about by reason of his prior condition and acts and conduct thereafter, and that the same would not have occurred except for the result of his own negligence and want of ordinary care, such as no person of ordinary care and prudence would have done, and that the Railway was not guilty of any negligence resulting from its acts which were the proximate result of his alleged injuries, but was on account of

his own carelessness and want of care in taking care of himself, which was the proximate cause of his injuries.

XV.

In not sustaining the Fifteenth Assignment of Error to the effect that Bigger was bound to use all means reasonably under his control to take proper care of himself after getting wet; that it was his duty to have gone to a hotel or some other place of safety where he could have gotten dry clothing and changed his wet clothing, or otherwise in protecting himself against further damage, or within a reasonable time after reaching San Antonio called in a physician and taken proper treatment and if he did not do so was he acting as an ordinary and prudent person would act in not taking proper care of himself.

XVI.

In not sustaining the Sixteenth Assignment of Error to the effect that at the time J. T. Bigger boarded the train for passage to San Antonio, was suffering from lung trouble or consumption and that he knew this fact, and it was not brought to the knewledge of the defendant and that he did not provide himself with a change of clothing and carry the same along, such failure was negligence on his part and that an ordinary prudent person under similar circumstances would have secured the same before continuing the trip and that in changing cars at Longview Junction became soaked with rain and water and the jury should believe that an ordinary prudent person under similar circumstances would have ascertained before reaching Longview Junction that a through San Antonio coach was in the train on which he was a passenger or if a prudent person under such circumstances would, after having gotten wet, taken care of himself by providing a change of dry clothing, or going to a hotel or some place of shelter, and not proceeded on his journey; and if the jury further believed after getting wet in his then physical condition resulted in any way to the injuries alleged that he would not have suffered except for having been in said physical condition at the time of getting wet; or that if he had had a dry change of clothing and have immediately put them on, or if he had gone to a hotel or some other place of shelter and not proceeded on the journey he would have avoided suffering the injuries claimed, then plaintiffs would not be entitled to compensation for such injuries against the defendant.

XVII.

In not sustaining the Seventeenth Assignment of Error to the effect that when said Bigger boarded the train he was suffering from lung trouble, knew the fact, of which defendant was not advised when said train reached Longview Junction, through the negligence of defendants, or either of them, became soaked with rain, which caused or resulted in any of the injuries complained of, if the jury believe from the evidence that such injuries or illness

would not have occurred except for the fact that the said Bigger was at said time sick, he could not recover.

## XVIII.

In not sustaining the Eighteenth Assignment of Error, to the effect, because after the institution of said suit J. T. Bigger departed this life and his widow and minor children were not made parties by Bill of Revivor, as in such cases made and provided, but prosecuted said suit in their name by amended pleading.

## XIX.

In not sustaining the Nineteenth Assignment of Error in which the Court was requested to instruct the jury, among other things, that all persons and witnesses who swore in the case in the employment of the railroad company, in the absence of any thing to discredit or contradict said evidence, could not be arbitrarily disregarded. The testimony of every witness sworn should have due consideration and weight to which in the opinion of the jury as conscientious men seeking the truth, they believe it was entitled to and the employment of business of the witness afford no reason why such evidence should arbitrarily or without reason be disregarded.

## XX.

In not sustaining the Twentieth Assignment of Error, that "the law requires all railroad companies in this State to provide and maintain adequate, comfortable and clean depots and depot building- at their several stations, for the accommodation of passengers, and to keep said depot buildings well lighted and warm for the comfort and accommodation of the travelling public. If therefore, the jury shall believe that there were sufficient depot and other buildings at Longview Junction to comply with the law and if they should further believe from the evidence that there were sufficient depot and buildings at Longview Junction, Texas, to shelter passengers and to protect them from the rain while waiting for trains, defendant would not be liable for any injury claimed as the result of his getting wet from rain, as testified to, which fell on him in transferring from the train of the Texas & Pacific Railway Co. to the train of the International & Great Northern Railway Company at Longview Junction, where the journey upon the Texas & Pacific Railway line terminated, if the jury should believe he was transferred with safety and care from Texarkana to Longview and sufficient time given him on the arrival of said train at the termination of his journey over the line of the Texas & Pacific Railway Company, to get off said train at Longview Junction to take the train of the International & Great Northern Ry. Co. from Longview to San Antonio."

## XXI.

In not sustaining the Twenty-first Assignment of Error to the effect that the increased risk arising from conditions affecting the fitness of passengers who are sick to journey where they are unknown to defendant, must rest upon the shoulders of passengers and the jury should give full consideration to all the facts and circumstances connected with said Bigger and his conduct from the time he entered the car until he left the same as bearing upon issue as to whether or not he exercised that care and prudence which an ordinary prudent person under similar circumstances would have exercised, and if he did not exercise ordinary care and prudence under the circumstances and his act and conduct contributed to his condition, the jury should find for the defendant.

## XXII.

In not sustaining the Twenty-second Assignment of Error to the effect that the condition of J. T. Bigger when he entered the cars for a trip to San Antonio was that of a sick man and the condition of his health was such as to increase the chances of injury to him by exposure, and in such condition failed to use care and prudence to avoid exposure, which he knew at the time he changed cars. Defendant would not be responsible for any injury that might result in transferring from the Texas & Pacific Ry. to the I. & G. N. Ry. cars unless the jury should believe that such injury would have resulted to him independent of the fact as to whether or not he was sick in arriving at their verdict and should consider all the facts and circumstances in connection with his condition, and then determine whether or not he used that ordinary care and prudence which an ordinary prudent person would have exercised under similar circumstances.

## XXIII.

In not sustaining the Twenty-third Assignment of Error to the effect that the illness of Bigger was traceable to his physical condition at the time he transferred from the Texas & Pacific Ry. to the I. & G. N. Ry. in the rain before he got wet, and that his alleged injuries and complaint was not traceable to the proximate result of defendant's negligence but to Bigger's own want of ordinary care, which contributed to and was the proximate result of his condition, the jury will find for the defendant.

## XXIV.

In not sustaining the Twenty-fourth Assignment of Error to the effect that when J. T. Bigger boarded the train for San Antonio, he was suffering from lung trouble or consumption, which was known to him but not known to the railway company, and in such condition on his arrival at Longview Junction became soaked with rain, and if the jury believe the injuries resulted from the condition of his

health and but for such condition such injuries would not have arisen, they should find for the defendant.

XXV.

In not sustaining the Twenty-fifth Assignment of Error to the effect that if the ills from which he suffered since August 12th for which he sought to recover damages, was the result of getting wet but such results would not have followed had he used ordinary care and by use of such ordinary care would have avoided getting wet, that the ills from which he suffered would not and could not have been contemplated and foreseen by defendant, Texas & Pacific Ry. Co. and the negligence, if any, of such company was not the proximate result of such injuries, then they will return a verdict for the defendant.

XXVI.

In not sustaining the Twenty-sixth Assignment of Error to the effect that if the jury believed as the train approached Longview Junction its employes passed through the coach in which Bigger was a passenger and announced that all passengers for I. & G. N. points should transfer to another car on said train and if they further believed that said Bigger had he exercised that degree of care that an ordinary prudent person under similar circumstances would have exercised, would have heard such announcement, then the verdict of the jury should have been for the defendant.

XXVII.

In not sustaining the Twenty-seventh Assignment of Error to the effect that if Bigger's illness was traceable to his physical condition at the time he transferred from the Texas & Pacific to the I. & G. N. Ry. in the rain and was not traceable to any natural or proximate result of defendant's negligence, the jury should find for the defendant.

XXVIII.

In not sustaining the Twenty-eighth Assignment of Error to the effect that there was no testimony introduced in evidence tending to show the length of lives, tables or mortality, as to the probable length of life of the deceased and no predicate was shown as the basis for damages as to the probable length of life of the said Bigger.

XXIX.

In not sustaining the Twenty-ninth Assignment of Error, in refusing to quash portions of the deposition of J. T. Bigger, set out in Bill of Exception No. 28, Record page 256 to 266 inclusive, too lengthy to set out in length herein, but to which the attention of the Court is respectfully called.

## XXX.

In not sustaining the Thirtieth Assignment of Error, as follows:

"The error of the trial Court, throughout the case, consisted in the fact that the railroad owed the very highest degree of care to said passengers and not holding it was discharged in this case:

(1) By transporting him safely to Longview, and for the convenience of passengers, by carrying the International & Great Northern Ry. chair car to I. & G. N. points, which stood in lieu of sheds, etc., at the point of transfer.

(2nd) And in holding and charging that the duty to passengers was not discharged by carrying said chair car into which the passengers were to transfer, to the I. & G. N. Ry Co. line at or before Longview, but likewise require it to provide other accomodations for passengers for Longview 'where they could alight to change cars and where they could be protected from the inclemency of the weather,' notwithstanding a safer way was provided on the train itself, of which J. T. Bigger failed to take advantage of."

## XXXI.

In not sustaining the Thirty-first Assignment of Error, that "The verdict was not only contrary to the law and the evidence but the same was highly excessive by reason of his diminished capacity to earn money on account of his consumption, for the amount given the widow and all children as well, as it could never have been earned by the sick man in the future."

## XXXII.

In not sustaining the Thirty-second Assignment of Error, as follows:

"It was clearly established by the evidence prior to the time he got wet he had been a sick man and was compelled to leave Owensboro to make his home in San Antonio and having gone to Kentucky, was returning to San Antonio on a train having sleepers therein, got in a Texas & Pacific coach when an I. & G. N. coach was attached for passengers for I. & G. N. points, riding therein practically a day and night, ignoring trainmen's calls to transfer on the train, or see or look for himself, which would have protected him from the rain and his failing to look out or care for himself, which if he had done he would have been able to transfer to the I. & G. N. car and saved himself from getting wet, and his own negligence in not so looking out for himself and his want of care as a matter of law in not so doing was the proximate cause of his getting wet and of his death."

## XXXIII.

In not sustaining the Thirty-third Assignment of error to the effect that the Court erred in allowing Dr. E. P. Dougherty to testify over the objection of the defendant as set out in Bill of Exception No. 6, Record page 206 to 211 inclusive, too lengthy to incorporate herein but to which the attention of the Court is respectfully called.

## XXXIV.

In not sustaining the Thirty-fourth Assignment of Error to the effect that the Court erred in allowing Mrs. Ludie Bigger to testify over the objection of the defendant, as set out in Bill of Exception No. 5, Record pages 213 to 216 inclusive, to which the attention of the Honorable Court is called, it being to lengthy to incorporate herein.

## XXXV.

In not sustaining the Thirty-fifth Assignment of Error to the effect that the Court erred in charging the jury that the Railway Company owed more than the highest duty to passengers to transport them safely on the train, it did not owe any other duty than of ordinary care to its passengers in providing a safe way for them to transfer from its train, on a though ticket to a car carried for that purpose on its train, provided for though passengers changing to the connecting line while on the train: or to use more than ordinary care in providing a suitable place for passengers leaving said train at the end of their journey to alight at the depot, and in respect thereto it was error to hold the railway responsible to the highest degree of care to erect shelters to protect such transferring passengers from rain when a safer way was provided to transfer to a suitable I. & G. N. car in transit; and in not holding the Railway Company had discharged its duty, without imposing upon it an additional burden of providing sheds for passengers to walk under, from the train."

## XXXVI.

The Court erred in not writing an opinion in this case discussing at least some of the Assignments and in holding as follows:

"By the COURT:

We find none of the assignments of error in this case well taken.

With regard to excessive damages see Alpha Portland Cement Co., v. Curzi, 211 F. 580-587, and cases there cited.

The judgment of the District Court is

Affirmed."

For this, the undisputed evidence shows that the said Bigger was a sick man and when he entered the train he had an opportunity to get into an I. & G. N. coach but without using ordinary care got in a T. & P. coach, each one of said coaches being plainly marked and branded, the T. & P. with the initials of its line and the I. & G. N. with the initials of its line in large letters, exposed where any person could have seen them on the coach had they used ordinary care, and if he had exercised ordinary care in getting on the coach, or at any time thereafter, or when the announcements were made throughout the train, before getting to Longview, he would have had an opportunity to have avoided the rain.

There is no decision any where holding or requiring railroads to build sheds at their depots to prevent passengers from getting

wet in entering or leaving trains, and the railway company, which ever one whose duty it was, had built sufficient depot in compliance with the laws of Texas and if any duty is imposed on railroads other than the statute requires, there is no decision cited requiring such, and if that is the duty of the railway the issue is squarely put to the Court for a written opinion for the observance of railroads hereafter.

Wherefore, and thereupon, your Petitioner prays this Honorable Court to review the record in this case, and reconsider the judgment herein affirming said cause, and grant it a rehearing to the end that said Assignments of Error, or some of them, be sustained and said cause reversed and for a new trial to be had in the Court below, with proper instructions.

That H. C. Carter, Perry J. Lewis and Fellbaum & Carter, who reside in San Antonio, Bexar County, Texas, are Attorneys of Record for Defendants in Error.

Your Petitioner further prays that this Honorable Court may direct the Clerk to hold up the issuance of any mandate herein until after this Honorable Court shall have passed on this motion; then if the same is not granted that the said mandate by the direction of this Honorable Court be still further held up for a reasonable time, to give your petitioner full opportunity to take this cause for review on error to the Supreme Court of the United States.

Respectfully submitted,

(Signed) GEORGE THOMPSON,
COBBS, ESKRIDGE & COBBS,
*Attorneys for Petitioner.*

We accept service of the foregoing motion for rehearing. Dated this 23d day of December, 1914.

(Signed) H. C. CARTER,
PERRY J. LEWIS,
FELLBAUM & CARTER,
*Attorneys for Defendants in Error.*

I, T. D. Cobbs, one of the attorneys making the foregoing petition for rehearing, do hereby certify that I believe the said petition is well founded, and same is not interposed for delay.

(Signed) T. D. COBBS,
*Attorney for Petitioner.*

*Order Denying Rehearing.*

Extracts from the Minutes of January 5th, 1915.

No. 2648.

TEXAS & PACIFIC RAILWAY COMPANY
versus
J. T. BIGGER et al.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

*Petition for Writ of Error and Order Allowing Same.*

Filed January 15th, 1915.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2648.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
J. T. BIGGER et al., Defendants in Error.

*Petition for Writ of Error, Assignments of Error and Order Allowing Writ of Error.*

To the Honorable the Supreme Court of the United States:

Now comes the Texas & Pacific Railway Company, a federal corporation created by and under the laws of Congress, and shows to the Court that in the trial and proceedings, and in the judgment rendered in the above cause, in the United States Circuit Court of Appeals, for the Fifth Circuit, on December 9th, 1914, error has intervened to the damage of the Texas & Pacific Railway Company, as is shown by the Assignments of Error, herewith attached and referred to as a part hereof.

The Texas & Pacific Railway Company desires to remove said cause to the United States Supreme Court from the United States Circuit Court of Appeals of the Fifth Circuit, for correction of said errors.

Wherefore, it prays that the Texas & Pacific Railway Company be granted a writ of error in the above cause to remove the same to the United States Supreme Court, to have the proceedings and judgment herein, reviewed, revised and corrected.

It prays that the amount of supersedeas bond be fixed by the Court.

(Signed) GEORGE THOMPSON,
COBBS, ESKRIDGE & COBBS,
*Attorneys for Texas & Pacific Ry. Co.*

*Assignments of Error.*

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2648.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
J. T. BIGGER et al., Defendants in Error.

And now comes your Petitioner, against whom the judgment was entered in this case, and files the following Assignments of Error as grounds for the reversal of the judgment of the Honorable Court of Appeals, affirming judgment of lower court, for the following reasons, to-wit:

I.

In not sustaining the First Assignment of Error to the effect that said suit as to this defendant was improperly brought in Bexar County, where it had no line of railroad, residence or local agent, but had its residence and general offices in Dallas County, Texas.

II.

In not sustaining its Second Assignment of Error, because your Petitioner under all the evidence as was shown, was entitled to an instructed verdict in its favor.

III.

In not sustaining the Third Assignment of Error because of the error of the court in not charging correctly and properly the duty of the passenger in respect to his duty and proper care while a passenger riding in said train, but emphasized too much the duties of the carrier, and extended that duty to apply as to the degree of care of the railway to the passenger after he had alighted from the train the same as though a passenger on the train.

IV.

In not sustaining the Fourth Assignment of Error, for the undisputed evidence showed that Petitioner furnished "adequate accommodations for passengers to alight to change cars" at Longview.

V.

In not sustaining the Fifth Assignment of Error, for it was error in submitting to the jury the question as to whether or not Petitioner forced and compelled Bigger to leave the train, for the undisputed evidence showed to the contrary and such charge was misleading and prejudicial to the jury for it emphasized a fact that which, under the evidence in this case, was improper to submit to the jury.

VI.

In not sustaining the Sixth Assignment of Error, in instructing the jury the carrier's duty was not discharged by stopping the train at Longview Junction; for stopping the train at a proper and safe place to get off, was a full compliance with that high decree of care it owed Bigger as a passenger on the train. After Bigger left the train, this Petitioner owed him no duty of high degree of care to protect him from rain and getting wet.

VII.

In not sustaining the Seventh Assignment of Error, for which a carrier owes the very highest degree of care in transporting a passenger while on its train, it does not owe the same degree of care to a passenger after leaving the train to protect him from rain, only ordinary care in preparing proper depot and grounds.

VIII.

In not sustaining the Eighth Assignment of Error, for if he was sick with consumption unknown to the Railway, where he left the train, and but for his said sickness the rain would not have hurt him the railway would not have been responsible.

IX.

In not sustaining the Ninth Assignment of Error, to the effect if Bigger knew or could have ascertained by the use of ordinary care there was an I. & G. N. coach attached to the train upon which he traveled from the point he entered the train in which he could have entered and ridden, on or before reaching Longview, which would have protected him from the rain and he would not have gotten wet, the company would not be liable for his negligence and want of care in taking the safer course.

X.

In not sustaining the Tenth Assignment of Error to the effect that the undisputed evidence showed that the said Bigger was transported without injury by your Petitioner from the place he entered said train to Longview, and whatever injury received was by getting wet after he left the train at the depot in crossing over the grounds of one of the railways, not shown which.

XI.

In not sustaining the Eleventh Assignment of Error, to the effect that the said Railway did not owe him any duty, certainly any high degree of care, to prevent the rain from falling on him and wetting him after he left its train to get on the I. & G. N. train.

XII.

In not sustaining the Twelfth Assignment of Error that the ticket of Bigger required him to leave the train at Longview within a reasonable time after his arrival there and no legal right on said train by virtue of said ticket thereafter.

XIII.

In not sustaining the Thirteenth Assignment of Error to the effect not to consider any injuries of the said Bigger unless they find from the preponderance of the evidence he did not contribute in any way to his condition and in order to recover it devolved upon them to show that Bigger exercised ordinary care and prudence in taking care of himself and that his act and conduct did not contribute to the said injuries, followed in an unbroken sequence from injuries received, resulting from the rain and that the same directly or proximately caused and produced the injury they claimed he received, if any, by reason of the water.

XIV.

In not sustaining the Fourteenth Assignment of Error to the effect that if Bigger's condition was brought about by reason of his prior condition and acts and conduct thereafter, and that the same would not have occurred except for the result of his own negligence and want of ordinary care, such as no person of ordinary care and prudence would have done, and that the Railway was not guilty of any negligence resulting from its acts which were the proximate result of his alleged injuries, but was on account of his own carelessness and want of care in taking care of himself, which was the proximate cause of his injuries.

XV.

In not sustaining the Fifteenth Assignment of Error to the effect that Bigger was bound to use all means reasonably under his control to take proper care of himself after getting wet; that it was his duty to have gone to a hotel or some other place of safety where he could have gotten dry clothing and changed his wet clothing, or otherwise in protecting himself against further damage, or within a reasonable time after reaching San Antonio called a physician and taken proper treatment and if he did not do so was he acting as an ordinary and prudent person would act in not taking proper care of himself.

XVI.

In not sustaining the Sixteenth Assignment of Error to the effect that at the time J. T. Bigger boarded the train for passage to San Antonio, was suffering from lung trouble or consumption and that he knew this fact, and it was not brought to the knowledge of the defendant and that he did not provide himself with a change of clothing and carry the same along, such failure was negligence on

his part and that an ordinary prudent person under similar circumstances would have secured the same before continuing the trip and that in changing cars at Longview Junction became soaked with rain and water and the jury should believe that an ordinary prudent person under similar circumstances would have ascertained before reaching Longview Junction that a through San Antonia coach was in the train on which he was a passenger or if a prudent person under similar circumstances would, after having gotten wet, taking care of himself by providing a change of dry clothing, or going to a hotel or some place of shelter, and not proceeded on his journey; and if the jury further believed after getting wet in his then phycical condition resulted in any way to the injuries alleged that he would not have suffered except for having been in said physical condition at the time of getting wet; or that if he had had a dry change of clothing and have immediately put them on, or if he had gone to a hotel or some other place of shelter and not proceeded on the journey he would have avoided suffering the injuries claimed, then plaintiff would not be entitled to compensation for such injuries against the defendant.

## XVII.

In not sustaining the Seventeenth Assignment of Error to the effect that when said Bigger boarded the train he was suffering from lung trouble, knew the fact, of which defendant was not advised when said train reached Longview Junction, through the negligence of defendants, or either of them, became soaked with rain, which caused or resulted in any of the injuries complained of, if the jury believe from the evidence that such injuries or illness would not have occurred except for the fact that the said Bigger was at the said time sick, he could not recover.

## XVIII.

In not sustaining the Eighteenth Assignment of Error to the effect —because after the institution of said suit J. T. Bigger departed this life and his widow and minor children were not made parties by Bill of Revivor, as in such case made and provided, but prosecuted said suit in their name by amending pleading.

## XIX.

In not sustaining the Nineteenth Assignment of Error in which the Court was requested to instruct the jury, among other things, that all persons and witnesses who swore in the case in the employment of the railroad company, in the absence of anything to discredit or contradict said evidence, could not be arbitrarily disregarded. The testimony of every witness sworn should have due consideration and weight to which in the opinion of the jury as conscientious men seeking the truth, they believe it was entitled to and the employment and business of the witness afford no reason why such evidence should arbitrarily or without reason be disregarded.

## XX.

In not sustaining the Twentieth Assignment of Error, that "the law requires all railroad companies in this State to provide and maintain adequate, comfortable and clean depots and depot buildings at their several stations, for the accommodation of passengers, and to keep said depot buildings well lighted and warm for the comfort and accommodation of the traveling public. If, therefore, the jury shall believe that there were sufficient depot and other buildings at Longview Junction to comply with the law and if they should further believe from the evidence that there were sufficient depot and buildings at Longview Junction, Texas, to shelter passengers and to protect them from the rain while waiting for trains, defendant would not be liable for any injury claimed as a result of his getting wet from rain, as testified to, which fell on him in transferring from the train of the Texas & Pacific Railway Company to the train of the International & Great Northern Railway Company at Longview Junction, where the journey upon the Texas and Pacific Railway line terminated, if the jury should believe he was transferred with safety and care from Texarkana to Longview and sufficient time given him on the arrival of the said train at the termination of his journey over the line of the Texas and Pacific Railway Company, to get off said train at Longview Junction to take the train of the International & Great Northern Ry. Co. from Longview to San Antonio."

## XXI.

In not sustaining the Twenty-first Assignment of Error to the effect that the increased risk arising from the conditions affecting the fitness of passengers who are sick to journey where they are unknown to defendant, must rest upon the shoulders of passengers and the jury should give full consideration to all facts and circumstances connected with said Bigger and his conduct from the time he entered the car until he left the same as bearing upon the issue as to whether or not he exercised that care and prudence which an ordinary prudent person under similar circumstances would have exercised, and if — did not exercise ordinary care and prudence under the circumstances and his act and conduct contributed to his condition, the jury should find for the defendant.

## XXII.

In not sustaining the Twenty-second Assignment of Error to the effect that the condition of J. T. Bigger when he entered the cars for a trip to San Antonio was that of a sick man and the condition of his health was such as to increase the chances of injury to him by exposure, and in such condition failed to use care and prudence to avoid exposure, which he knew at the time he changed cars, defendant would not be responsible for any injury that might result in transfering from the Texas & Pacific Ry. to the I. & G. N. Ry. cars unless the jury should believe that such injury would have resulted

to him independent of the fact as to whether or not he was sick, in arriving at their verdict and should consider all the facts and circumstances in connection with his condition, and then determine whether or not he used that ordinary care and prudence which an ordinary prudent person would have exercised under similar circumstances.

XXIII.

In not sustaining the Twenty-third Assignment of Error to the effect that the illness of Bigger was traceable to his physical condition at the time he transferred from the Texas & Pacific Ry. to the I. & G. N. Ry. in the rain before he got wet, and that his alleged injries and complaint *was not* traceable to the proximate result of defendant's negligence but to Bigger's own want of ordinary care, which contributed to and was the proximate result of his condition, the jury will find for the defendant.

XXIV.

In not sustaining the Twenty-fourth Assignment of Error to the effect that when J. T. Bigger boarded the train for San Antonio, he was suffering from lung trouble or consumption, which was known to him but not known to the railway company, and in such condition on his arrival at Longview Junction became soaked with rain, and if the jury believes the injuries resulted from the condition of his health and but for such condition such injuries would not have arisen, they should find for the defendant.

XXV.

In not sustaining the Twenty-fifth Assignment of Error to the effect that if the ills from which he suffered since August 12th, for which he sought to recover damages, *was* the result of getting wet but such results would not have followed had he used ordinary care and by use of such ordinary care would have avoided getting wet, that the ills from which he suffered would not and could not have been contemplated and foreseen by defendant, Texas & Pacific Ry. Co. and the negligence, if any, of such company was not the proximate cause of such injuries, then they will return a verdict for the defendant.

XXVI.

In not sustaining the Twenty-sixth Assignment of Error to the effect that if the jury believed as the train approached Longview Junction its employees passed through the coach in which Bigger was a passenger and announced that all persons for I. & G. N. points should transfer to another car on said train and if they further believed that said Bigger had he exercised that degree of care that an ordinary prudent person under similar circumstances would have exercised, would have heard such announcement, then the verdict of the jury should be for the defendant.

## XXVII.

In not sustaining the Twenty-seventh Assignment of Error to the effect that if Bigger's illness was traceable to his physical condition at the time he transferred from the Texas & Pacific to the I. & G. N. Ry. in the rain and was not traceable to any natural or proximate result of defendant's negligence, the jury should find for the defendant.

## XXVIII.

In not sustaining the Twenty-eighth Assignment of Error to the effect that there was no testimony introduced in the evidence tending to show the length of lives, tables of mortality, as to the probable length of life of the deceased and no predicate was shown as to the basis for damages as to the probable length of life of said Bigger.

## XXIX.

In not sustaining the Twenty-ninth Assignment of Error in refusing to quash portions of the deposition of J. T. Bigger, set out in Bill of Exceptions No. 28, Record page- 256 to 266, inclusive, too lengthy to set out in length herein, but to which the attention of the Court is respectfully called.

## XXX.

In not sustaining the Thirtieth Assignment of Error, as follows: "The error of the trial Court, throughout the case, consisted in the fact that the railroad owed the very highest degree of care to said passengers and not holding that it was discharged in this case:

(1) By transporting him safely to Longview, and for the convenience of passengers, by carrying the International & Great Northern Ry. chair car to I. & G. N. points, which stood in lieu of sheds, etc., at the point of transfer.

(2) And in holding and charging that the duty to passengers was not discharged by carrying said chair car into which the passengers were to transfer to the I. & G. N. Ry. Co. line at or before Longview, but likewise require it to provide other accommodations for passengers for Longview 'where they could alight to change cars and where they would be protected from the inclemency of the weather', notwithstanding a safer way was provided on the train itself, of which J. T. Bigger failed to take advantage of."

## XXXI.

In not sustaining the Thirty-first Assignment of Error that "The verdict was not only contrary to the law and the evidence but the same was highly excessive by reason of his diminished capacity to earn money on account of his consumption, for the amount given the widow and all children as well, as it could never have been earned by the sick man in the future."

## XXXII.

In not sustaining the Thirty-second Assignment of Error, as follows:

"It was clearly established by the evidence prior to the time he got wet he had been a sick man and was compelled to leave Owensboro to make his home in San Antonio, and having gone to Kentucky, was returning to San Antonio on a train having sleepers therein, got in a Texas & Pacific coach when an I. & G. N. coach was attached for passengers for I. & G. N. points, riding therein practically a day and night, ignoring trainmen's calls to transfer on the train, or see or look for himself, which would have protected him from the rain and his failing to look out or care for himself, which, if he had done he would have been able to transfer to the I. & G. N. car and saved himself from getting wet, and his own negligence in not so looking out for himself and his want of care as a matter of law in not so doing was the proximate cause of his getting wet and of his death."

## XXXIII.

In not sustaining the Thirty-third Assignment of Error to the effect that the Court erred in allowing Dr. E. P. Dougherty to testify over the objection of the defendant as set out in Bill of Exception No. 6, Record page- 206 to 211, inclusive, too lengthy to incorporate herein but to which the attention of the Court is respectfully called.

## XXXIV.

In not sustaining the Thirty-fourth Assignment of Error to the effect that the Court erred in allowing Mrs. Ludie Bigger to testify over the objection of the defendant, as set out in Bill of Exception No. 5, Record pages 213 to 216 inclusive, to which the attention of the Honorable Court is called, it being too lengthy to incorporate herein.

## XXXV.

In not sustaining the Thirty-fifth Assignment of Error to the effect that the Court erred in charging the jury that the Railway Company owed more than the highest duty to passengers to transport them safely on the train. It did not owe any other duty than of ordinary care to its passengers in providing a safe way for them to transfer from its train, on a through ticket to a car carried for that purpose in its train, provided for through passengers changing to the connecting line while on the train; or to use more than ordinary care in providing a suitable place for passengers leaving said train at the end of their journey to alight at the depot, and in respect thereto it was error to hold the railway responsible to the highest degree of care to erect shelters to protect such transferring passengers from rain when a safer way was provided to transfer to a suitable I. & G. N. car in transit; and in not holding the railway company has discharged its duty, without imposing upon it an additional burden of providing sheds for passengers to walk under, from the train."

## XXXVI.

The Court erred in not writing an opinion in this case, discussing at least some of the Assignments and erred in holding as follows:

"We find none of the assignments of error in this case well taken. With regard to excessive damages see Alpha Portland Cement Co. v. Curzi, 211 F. 580-587, and cases cited."

For this, the undisputed evidence shows that the said Bigger was a sick man and when he entered the train he had an opportunity to get into an I. & G. N. coach but without using ordinary care got into a T. & P. coach, each one of said coaches being plainly marked and branded, the T. & P. with the initials of its line and the I. & G. N. with the initials of its line in large letters, exposed where any person could have seen them on the coach had they used ordinary care, and if he had exercised ordinary care in getting on the coach, or at any time thereafter, or when the announcements were made through the train, before getting to Longview, he would have had an opportunity to have avoided the rain.

## XXXVII.

The Honorable Court of Appeals further erred in not passing on the question of the excessiveness of the judgment in this case, and in holding in effect that said Court could not consider said judgment, for this, that it is in effect a denial of a valuable right to Petitioner under the laws of Texas, as provided by Article 1631 of the Revised Civil Statutes of the State of Texas; said holding in conflict with the decision in the case of Felton vs. Spiro, 79 Fed. 576; 24 C. C. A. Rep. 327; in effect holding the Court did, in a proper case, have the power to reverse the cause therefor.

Wherefore your Petitioner prays that the Honorable Supreme Court of the United States will herein consider the foregoing Assignments of Error and will adjudge and decree that the said verdict and judgment of the Court below, and the judgment of the Honorable Circuit Court of Appeals, affirming said judgment, be herein reviewed, revised, corrected and reversed, and for all other relief that may or can be granted herein.

(Signed) GEORGE THOMPSON.
COBBS, ESKRIDGE & COBBS,
*Attorneys for Petitioner.*

The above application for a Writ of Error, and assignment of error, *have* been presented to me, and the same is allowed and granted, and the amount of supersedeas bond fixed at $2,000.00.

(Signed) DON A. PARDEE,
*Circuit Judge.*

Dated Jan'y 15th, 1915.

*Bond on Writ of Error.*

Filed January 15th, 1915.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2648.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
J. T. BIGGER et al., Defendants in Error.

Bond for Writ of Error.

Know all men by these presents, That we, The Texas & Pacific Railway Company, a corporation duly incorporated and organized under and by virtue of an Act of Congress, of the United States, as principal, and Charles Godchaux as surety, in the full and just sum of Two Thousand Dollars to be paid to the said Mrs. Ludie Bigger et al., or their certain Attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrator-, jointly and severally, by these presents.

Sealed with out seals, and dated this 15th day of January, in the year of our Lord, One Thousand, Nine Hundred and Fifteen.

Whereas, lately at a Session of the United States Circuit Court of Appeals, holding sessions in and for the Fifth Circuit, in a suit depending in said Court between The Texas & Pacific Railway Company and Mrs. Ludie Bigger, Charles H. Bigger, James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger and Robert L. Bigger, a judgment was rendered on December 9th, 1914, affirming a judgment which was rendered in said cause on the 8th day of January, 1914, in the District Court of the United States, for the Western District of Texas, at San Antonio, for the sum of Fifteen Thousand, Two Hundred and Fifty ($15,250.00) Dollars, and costs of suit, with six per cent (6%) interest thereon from the date of said judgment, and whereas the said Texas & Pacific Railway Company has obtained a Writ of Error and has filed a copy thereof in the office of the Clerk of the said United States Circuit Court, for the Fifth Circuit, to reverse the judgment in the aforesaid suit, and has also obtained a citation directed to the said Mrs. Ludie Bigger et al., and her Attorneys of Record, H. C. Carter, Perry J. Lewis, Claud J. Carter and Earnest Fellbaum, citing and admonishing them to appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, within thirty (30) days from the date thereof.

Now the condition of the above obligation is such, That if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make

good its plea, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) TEXAS & PACIFIC RAILWAY COMPANY,
By HOWE, FENNER, SPENCER & COCKE,
*Agent and Attorney.*
CHARLES GODCHAUX.

Sealed and delivered in the presence of—
ESMOND PHELPS.

Dated Jan. 15, 1915.

Approved by—
(Signed) DON A. PARDEE,
*Circuit Judge.*

*Clerk's Certificate.*

UNITED STATES OF AMERICA, *ss:*

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 312 to 342 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2648, wherein The Texas & Pacific Railway Company is plaintiff in error, and J. T. Bigger et al. are defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 311 are identical with the record and supplemental record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 22nd day of January, A. D. 1915.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of Appeals.*

UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and J. T. Bigger et al., Defendants in Error, No. 2648 of the docket, a manifest error hath happened, to the great damage of the said Texas and Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 15th day of January, in the year of our Lord One Thousand Nine Hundred and Fifteen.

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of Appeals.*

Allowed by—

DON A. PARDEE,
*Circuit Judge.*

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the Defendants in Error.

Dated this 15th day of January, A. D. 1915.

FRANK H. MORTIMER,
*Clerk U. S. Circuit Court of Appeals, Fifth Circuit.*

[Endorsed:] No. 2648. In the United States Circuit Court of Appeals for the Fifth Circuit. The Texas & Pacific Ry. Co., Plaintiff in Error, vs. J. T. Bigger et al., Defendants in Error. Writ of Error. U. S. Circuit Court of Appeals. Filed Jan. 15, 1915. Frank H. Mortimer, Clerk. Cobbs, Eskridge & Cobbs, Lawyers, 716-720 Brady Bldg., San Antonio, Texas.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2648.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
J. T. BIGGER et al., Defendants in Error.

THE UNITED STATES OF AMERICA:

The President of the United States to J. T. Bigger et al., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C. within Thirty days from the date hereof, pursuant to a writ of error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein The Texas and Pacific Railway Company is Plaintiff in error, and J. T. Bigger et al. are Defendants in Error, to show ca-se, if any there be, why the judgment rendered against the said Texas and Pacific Railway Company, petitioner, and in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 15th day of January, in the year of our Lord One Thousand Nine Hundred and fifteen.

DON A. PARDEE,
*United States Circuit Judge.*

*I* hereby accept service of this Citation with like effect as if served on J. T. Bigger et al. this 20th day of January, 1915.

H. C. CARTER,
PERRY J. LEWIS,
FELLHAM & CARTER,
*Attorney- for J. T. Bigger et al.*

[Endorsed:] No. 2648. In the United States Circuit Court of Appeals for the Fifth Circuit. The Texas & Pacific Railway Co., Plaintiff in Error, vs. J. T. Bigger et al., Defendants in Error. Citation in Error. U. S. Circuit Court of Appeals. Filed Jan. 22, 1915. Frank H. Mortimer, Clerk. Cobbs Eskridge & Cobbs, Lawyers, 716-720 Brady Bldg., San Antonio, Texas.

Endorsed on cover: File No. 24,548. U. S. Circuit Court Appeals, 5th Circuit. Term No. 804. The Texas & Pacific Railway Company, plaintiff in error, vs. J. T. Bigger et al. Filed February 5th, 1915. File No. 24,548.

14

Office Supreme Court, U. S.
FILED
MAY 24 1915
JAMES D. MAHER
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1914.**

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## No. 342

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THE TEXAS & PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

*vs.*

J. T. BIGGER ET AL.

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**REPLY TO MOTION TO DISMISS OR AFFIRM.**

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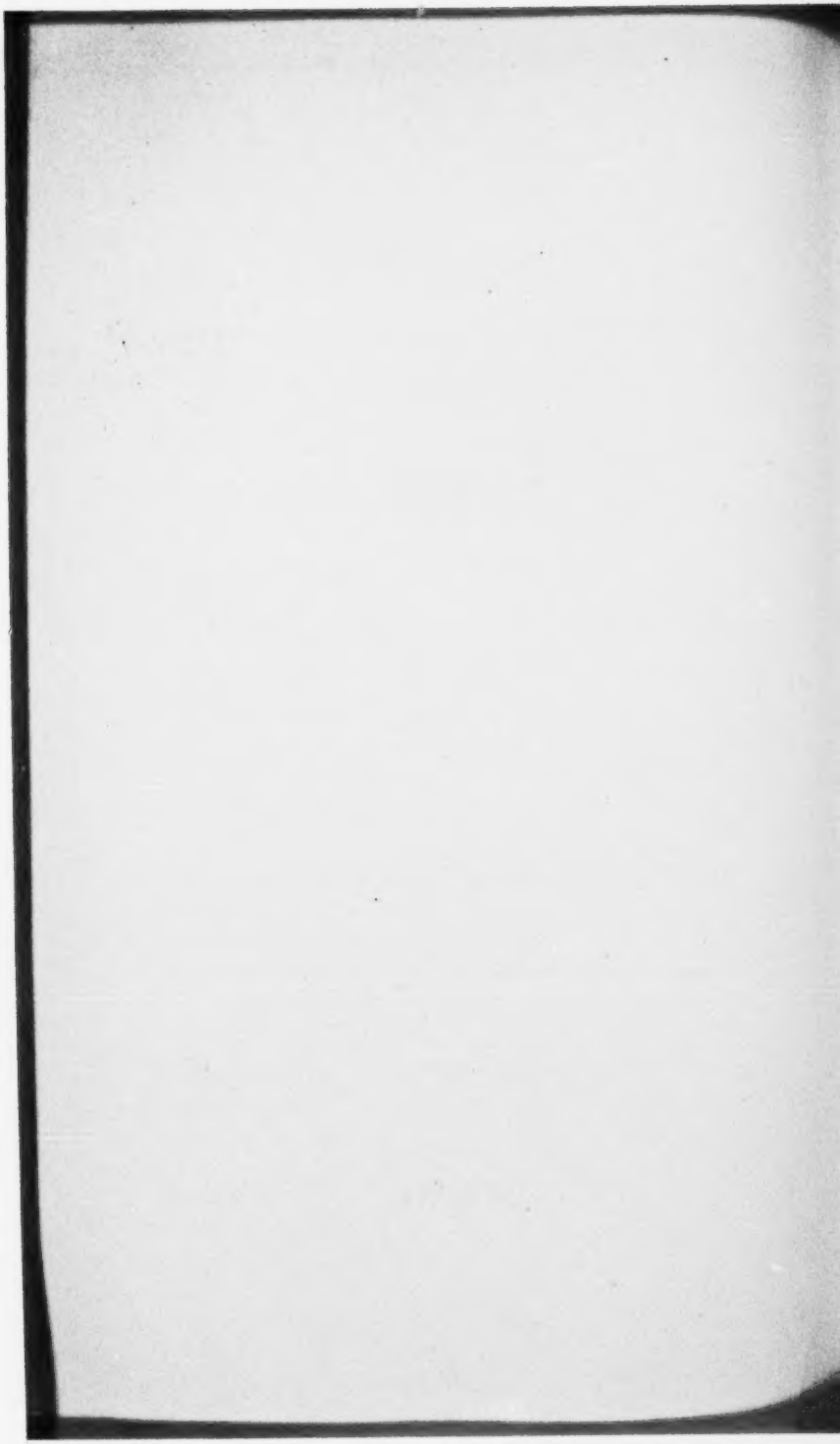
GEORGE THOMPSON,
T. D. COBBS,
*Attorneys for Plaintiff in Error.*

**(24,548)**



IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1914.**

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## No. 804.

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THE TEXAS & PACIFIC RAILWAY CO., PLAINTIFF IN ERROR,

*vs.*

J. T. BIGGER ET AL., DEFENDANTS IN ERROR.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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## REPLY TO MOTION TO DISMISS OR AFFIRM.

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*To the Honorable Judges of the Supreme Court of the United States:*

In reply to defendant in error's motion to dismiss and protest against the consideration of it at this time, plaintiff in error says the defendants in error have briefed the case prematurely and in reply to brief in the court below and not in reply to the brief of petitioner in error filed in this

court, which will be found to be different in many particulars.

Because this is not one of the cases contemplated by subdivisions 5 and 6 of Rule 6 of the Supreme Court.

We deny most emphatically that the writ was sued out for delay and the questions on which said cause pends are frivolous, but that they are substantial and material.

This cause was carried to the Supreme Court of the United States on the writ of error and it was briefed prior to the motion of defendants in error.

It was briefed before the decision of this honorable court in the Clara Hill case was decided, passing upon the plea of privilege and venue.

However, the question was raised different in that case from this case, as the record shows. Likewise the same applies to the question of excessiveness of the verdict and judgment.

This cause, in our opinion, has abundant merit. Bigger was a sick man, who resided in Owensboro, Kentucky, where he contracted the fatal disease of consumption, no doubt from exposure in his home. He was sent to San Antonio to live, for he could not live in Kentucky. After remaining in San Antonio for about a year he returned to Kentucky. Not daring to reside or do any business there, knowing it would be fatal for him to do so, he undertook, during the rainy season, to aid a new man in being installed in a position for the company where he had formerly worked. Leaving there on his return trip, the same trip he had traveled before, he took the Missouri Pacific train at Little Rock, Arkansas, to which was attached a Pullman car and chair car, for San Antonio. The Pullman car came to San Antonio, as likewise the I. & G. N. car from Longview on, the place where the transfer was made of the same cars put on that train for the accommodation of passengers. There is not a word of complaint against his treatment while on the train from Little Rock, Arkansas, to Longview, Texas. He was transferred safely to Longview,

as far as the Texas & Pacific Railway was to carry him. He safely alighted from the train, and the company up to this point had performed its very high degree of care. At Longview there was a safe place to walk and a perfectly satisfactory depot, fully in compliance with the laws of Texas under the rules prescribed by the law and the Railroad Commission. The only complaint against the Texas & Pacific was that when the train arrived there it was raining and because he got off the car at Longview instead of transferring, as he should have done, either to one of the sleepers or to the chair car carried by the Texas & Pacific and delivered at that point to the I. & G. N. Railway. The rain was unprecedented; it was the act of God, and even if it had not been a heavy rain the company was under no obligation to build sheds across the railroad tracks or otherwise to protect him.

While we have found no case directly in point as to more than ordinary care the railroad must use in taking care of its passengers, we do say that the passenger is under *some obligation to use ordinary care* for himself and to exercise his faculties in looking out for and taking care of himself on the trip.

In Louisville & N. R. Co. *vs.* Messer, 175 S. W., —, in speaking of instruction No. 1 of the trial court, on page 362 the court says:

> "(1) It was the duty of the defendant railroad company to exercise the highest degree of care to safely carry the plaintiff, Mahala Messer, while a passenger on its train mentioned in the evidence, and to allow her to alight from said train in safety. If you shall believe from the evidence that the flagman of defendant company while assisting passengers to alight from defendant's train at Savoy on the occasion mentioned in evidence carelessly or negligently pulled or jerked the plaintiff, at a time when plaintiff was exercising ordinary care for her own safety and while she was on the steps of said coach alighting

therefrom, with such force or violence that the plaintiff was precipitated to the ground, injuring her in her body or limbs, from which she suffered pain or loss of power to perform labor, then the law is for the plaintiff, Mahala Messer, and you will so find.'

"The instruction is attacked on the ground that it imposed on the railroad company the duty to exercise the highest degree of care to safely carry plaintiff and to allow her to alight in safety. It is argued that as no accident happened to the train plaintiff had been safely carried to her destination, and that in assisting her to alight the flagman was required to exercise only ordinary care. Louisville & Nashville R. Co. *vs.* Lee, 140 Ky., 91; 130 S. W., 813. The language complained of was merely perfunctory. The real issue was whether or not the flagman pulled or jerked plaintiff from the steps of the car. In submitting this, the real issue, the instruction is not subject to complaint. We are not, therefore, inclined to hold the instruction prejudicial for the reason assigned. Louisville & Interurban R. Co. *vs.* Hardin, 157 Ky., 13; 162 S. W., 547."

Was the deceased exercising ordinary care for his safety when he got off the train when he might have by requesting the conductor caused the train to be connected so that he could transfer, as it had not been put on the I. & G. N. track at that time and for some time afterwards, for he remained in the shed considerable time and until the train was made up on the I. & G. N. track? He did not exercise ordinary care for his own safety, knowing he was a sick man and a consumptive, not known to any one else. If he had notified the engineer or conductor that he was a sick man and desired to be transferred in a safe way, it would evidently have been done, but instead of that he chose the other way; that is, of going in the rain and remaining in the shed until the cars were attached and then again went in the rain to enter the I. & G. N. train. The railroad company was not required to use more than *ordinary care* after he left the train if he was still a passenger.

The court refused our charges, submitting his negligence, if any, to the jury throughout the case.

We do not believe it necessary to further notice the motion made by defendants in error, and refer this honorable court to our brief of the case.

In this connection we note several typographical errors, of no great importance, however, and ask leave for the clerk to make corrections in our brief. For instance, on page 82, line 8, after the words "special charge" insert the words "the bill of exception," and after the word "eighteen," "Record, p. 237," so that as corrected it will read "special charge, bill of exception No. 18, Rec., 237." On page 84 it should be seventeenth point of fact instead of law. On page 115 the first word of the proposition should be "the" instead of "this." These matters, however, are immaterial and the court will observe these and such like errors as typographical.

Respectfully submitted,

GEORGE THOMPSON,
T. D. COBBS,
*Of Cobbs, Eskridge & Cobbs,*
*Attorneys for Plaintiff in Error.*

[Endorsed:] 804/24548. No. 804. In the Supreme Court of the United States. Texas & Pacific Ry. Co. *vs.* J. T. Bigger *et al.* Answer of plaintiff in error to defendants in error's motion to dismiss said cause, etc. Cobbs, Eskridge & Cobbs, lawyers, 716-720 Brady Bldg., San Antonio, Texas.

Office Supreme Court, U. S.
FILED
MAY 17 1915
JAMES D. MAHER
CLERK

IN THE

# Supreme Court of the United States

No. 804. 342

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

J. T. BIGGER, ET AL, *Defendants in Error.*

# Motion to Affirm or Dismiss, and Brief of Defendants in Error

FELLBAUM & CARTER,
H. C. CARTER,
PERRY J. LEWIS,
Attorneys for Defendants in Error.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1914

NO. 804

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

J. T. BIGGER, ET AL., Defendants in Error

## Motion to Affirm or Dismiss, and Brief and Argument of Defendants in Error on Said Motion

## Motion to Affirm or Dismiss Filed by Defendants in Error

Now come the defendants in error, by their attorneys, and move the court to affirm or dismiss the above entitled cause under subdivisions 5 and 6 of Rule 6 of the Supreme Court of the United States, because it is manifest that the writ of error in this cause

was sued out for delay only, and that the questions on which said cause depends are so frivolous as not to need further argument, and are settled and precluded by the previous decisions of this Honorable Court.

## STATEMENT OF THE NATURE AND RESULT OF CASE.

This action was brought by J. T. Bigger against the International & Great Northern Railway Company, The Texas & Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, in the State District Court of Bexar County, Texas, for personal injuries sustained by J. T. Bigger on the 10th day of August, 1912. The plaintiff, J. T. Bigger, alleged in substance that desiring to travel from San Antonio, Texas, to Owensboro, Ky., and return, he purchased in San Antonio, Texas, from the International & Great Northern Railway Company a round-trip ticket entitling him to be transported over the three lines of railway named from San Antonio, Texas, to Owensboro, Ky., and return. That on the return trip, and while on a train of the Texas & Pacific Railway Company, at the station of Longview, Texas, he was commanded and compelled to leave the coach in which he was riding in order to change cars to a train on the International & Great Northern Railway Company, and that he was so compelled and required to leave the Texas & Pacific Railway Company train during a very severe downpour of rain, at a place where there was no protection, and that he and his clothes became thoroughly drenched with rain, and he was required to ride in his wet clothes until he reached San Antonio, Texas, at about 11:00 oclock at night, and that as a result of said wetting and exposure he became seriously and dangerously ill. The petition further alleged that at the time the Texas & Pacific Railway train reached the station of Longview, Texas, there was in said train a car destined to San Antonio, on the line of the International & Great Northern Railway Company, and that the employes and agents of the Texas & Pacific Railway train knew that this car was so attached to their train, and that they neglected to inform plaintiff of this fact and to give

him an opportunity to transfer to said car while in the said train without getting off in the rain; that this car was attached to the Texas & Pacific train at the time said plaintiff was compelled and required to leave said train, and that, under all the facts and circumstances, it was negligence on the part of the employes and agents of the Texas & Pacific train to command and compel plaintiff to get off said train in said rain storm, without affording him an opportunity to safely transfer to the International & Great Northern Railway car. (Rec., pp. 2 to 6.)

The Texas & Pacific Railway Company, joined by its two co-defendants, presented its petition to remove said cause to the United States District Court for the Western District of Texas, and, on said petition, said cause was duly removed. (Record, p. 302.)

On March 31st., 1913, by amended petition, filed in the United States District Court, the death of J. T. Bigger was suggested, and his wife and six surviving children were made parties plaintiff.

At the May term of the United States District Court all three defendants appeared, and, without reservation, answered to the merits. On May 16th., 1913, the cause was continued on motion of all defendants. (Record, p. 55.)

On January 5th., 1914, all defendants filed amended answers, and on January 6th. the cause was tried before a jury. After the evidence was concluded the court instructed a verdict in favor of the International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, and as to the Texas & Pacific Railway Company the trial court fairly and fully submitted all disputed issues of fact to the jury. The charge of the distinguished judge who presided at the trial of this cause so clearly sets forth the issues raised by the pleadings and evidence, and so plainly states the law that we will here set out the charge as a part of the statement of the case:

"This suit was originally instituted by J. T. Bigger for recovery of damages against the International & Great Northern Railway Company, and the Texas & Pacific Railway Company, and the St. Louis, Iron Mountain & Southern Railway Company. After the

original petition was filed the plaintiff departed this life in the month of February, 1913, and his surviving wife and six children have made themselves parties. Of the six children, James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger and Robert L. Bigger are minors, and the other child, Charles H. Bigger, is about 22 years of age. As the suit now stands, it is in the name of Ludie Bigger, the surviving wife, in her own right, and in the name of the five minor children by their mother, Ludie Bigger, as next friend, and also in the name of Charles H. Bigger, as Plaintiffs. You are instructed under the evidence in this case, to return a verdict in favor of the Intrenational & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company. The suit will then stand in the name of the plaintiffs above named against the Texas & Pacific Railway Company, and this company will hereafter be referred to as the defendant.

The Plaintiffs maintain that the defendant was guilty of several distinct acts of negligence, each of which caused and contributed to produce the illness and death of said J. T. Bigger. Without copying the entire petition, the plaintiffs charge the following acts of negligence:

First: That the train of the Texas & Pacific Railway Company, upon which the said J. T. Bigger was a passenger from Texarkana, Texas, until it reached the point near Longview, Texas, where it stopped, had a passenger coach attached, which continued beyond Longview, Texas, over the line of railway of the defendant, International & Great Northern Railway Company, and as far as San Antonio, Texas; that said defendant, Texas & Pacific Railway Company, its servants and employes, knew that said J. T. Bigger's destination point was San Antonio, Texas, yet, notwithstanding such knowledge, they negligently failed to inform or notify said J. T. Bigger that this through passenger coach was in said train upon which he was riding, and negligently failed to give him an opportunity to safely enter said car while the same was attached to the train upon which he was a passenger before he was ordered to leave

said train at or near Longview, Texas, by passing through the other cars, and thus would have avoided the exposure of the said J. T. Bigger to said rain and water, and the defendant's negligence in this respect directly caused and contributed to the illness and death of the said J. T. Bigger.

Second. That when said train came to a stop at or near the station of Longview, Texas, it was raining and the ground was covered with water, and the said defendant, Texas & Pacific Railway Company, its servants and employes negligently ordered and commanded the said J. T. Bigger to leave the said train in said rain and water and by reason of such negligence he was compelled to so leave said train and thus be exposed to said rain and water, and said defendant was guilty of negligence in thus exposing him to said rain and water and in not providing a reasonably safe and protected place for him to alight, and therefore, plaintiffs allege that the defendant's negligence in this respect directly caused and contributed to the illness and death of the said J. T. Bigger.

Briefly stated, the defendant denies that it was guilty of any negligence causing or contributing to the illness and death of the deceased. The answer further avers that the deceased, J. T. Bigger, could easily, by the exercise of ordinary care, have walked from the Texas & Pacific coach, before reaching Longview Junction, into the International & Great Northern coach without exposing himself to the weather. It is further averred in the answer that the defendant had sufficient station buildings at Longview Junction for passengers, that the deceased, Bigger, could easily have gone to said buildings for shelter from the rain; and that if he failed to do so and was exposed to the rain for any length of time, then the exposure, it is averred, was the result of his own negligence and want of care in standing in the rain and refusing to go to a place of shelter provided for passengers. It is further averred that the ill health of the deceased was not caused by nor was the result of any negligence on the part of the defendant; that deceased was, on the 10th day of August, 1912, in an extremely poor state of health and had for a long time been the victim of a tubercular infection and that his

death was the direct and proximate result of said infection and not directly and proximately caused by this defendant. And it may be further stated that, generally speaking, the defendant pleads contributory negligence on the part of the deceased.

The Plaintiffs, as already intimated, in their petition attribute the illness and death of the deceased to the negligence of the defendant as the direct cause of same. Hence it is incumbent upon them to establish, by preponderance of the evidence, the truth of the charge they prefer. Therefore, if his illness and subsequent death did not result directly from the negligence of the defendant, they would not be entitled to recover. What then is negligence? It is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person, under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. (See 95 U. S., 441-442).

Coming to the proof: It is evident that the deceased was a passenger on the Texas & Pacific train proceeding from Texarkana west to Fort Worth and El Paso; that there was among the coaches of that train a day coach of the International & Great Northern Railway Company destined to San Antonio, which point was the destination of the deceased. It also appears from the proof that the deceased was seated in a Texas & Pacific coach which was destined to points west of Longview. The Texas & Pacific train connected with the International & Great Northern train at Longview Junction. At that point it became necessary to detach from the Texas & Pacific train the International & Great Northern car for San Antonio and attach it to the latter train. The Texas & Pacific train reached Longview Junction on August 10, 1912; and it is claimed by the plaintiffs that the deceased was required, when defendant's train stopped at Longview Junction, to leave the train in a hard, severe rain, and that in going from the train to the small switch shanty, his clothing became thoroughly drenched. It is further claimed that after he entered the International & Great

Northern train for San Antonio, his clothing remained in that drenched condition until he arrived in San Antonio about 11 o'clock on the same night. The contention of plaintiffs is that the illness and death of the deceased resulted from the rain to which deceased was exposed through the negligence of the defendant.

You are instructed that, as a common carrier, the duty of defendant to passengers on its train did not end by merely stopping the train at Longview Junction. It was its duty to provide adequate and safe accommodations for passengers where they could alight to change cars and where they could alight to change cars and where they could be protected from the inclemency of the weather. If they provided such safe and adequate accommodations and such as to protect the passengers from the inclemency of the weather, then the defendant had fulfilled its duty under the law; and for any injury to the deceased resulting from getting off the train at the point mentioned, no recovery could be had. If, however, the defendant did not provide for its passengers such accommodations as just described, and, further, if the employes of the defendant required the deceased to get off the train in a severe rain, and his illness and death resulted therefrom, without any fault or negligence on his part, the plaintiffs would be entitled to recover. In this immediate connection you are further instructed that the deceased was required to look out for his own comfort and safety; and if he was in any respect guilty of negligence contributing to his illness and death, then no recovery can be had by the plaintiffs in this proceeding.

In this connection it is claimed by the defendant that its employes and agents notified the deceased, before the arrival of the train at Longview Junction, that passengers destined for San Antonio should leave the coach of the defendant and go back to the International & Great Northern coach, whose destination was San Antonio. If the employes and agents did, as defendant contends, notify the deceased, as stated, then it was his duty to leave the Texas & Pacific coach and go to the International & Great North-

ern coach for the purpose of being transported to his destination; and if the deceased failed to act upon such notification and go back to the International & Great Northern coach, then he so far contributed to his illness and death as would prevent a recovery on the part of the plaintiffs. You will observe right at this point that there was a sharp conflict in the testimony,—the defendant contending that such notification was given to the passengers in the Texas & Pacific coach, and the plaintiffs contending that the deceased had no such notice. This question of fact, like all other questions of fact in the case, you will determine from a consideration of all the facts and circumstances in evidence. To entitle the plaintiffs to a recovery, the illness and death of the deceased must be attributable directly to the negligence of the defendant. If, therefore, his illness and death are not attributable to the negligence of the defendant, then no recovery can be had. If his illness and death were due to some other cause, for example, pulmonary tuberculosis, from which he had previously suffered, and did not result directly from the negligence of the defendant, then the plaintiffs are not entitled to recovery in this case." (Record, pp. 73 to 79.)

At the request of the Texas & Pacific Railway Company, the three following special charges were given:

"Defendant requests the court to instruct the jury if they believe from the evidence that J. T. Bigger was sick prior to the alleged injury, and would have continued to get worse, whether he got wet or not, and died as a result of his prior disease, if any, the jury will not consider any damages alleged or claimed, if any, the prominate result of his own condition."

"If you should find that J. T. Bigger, prior to his injuries, was suffering with any disease or complaints, and should also find from the testimony that such disease or complaints, if any, were such as he would have gotten well of; and that the negligence, if any, of the defendant, aggravated such disease or complaints, then plaintiffs would only be entitled to recover for such injuries or augmented suffering as were caused and produced alone as the

direct and proximate result and consequence of the negligent acts of the defendant, if any, as charged, taking into consideration his prior condition of health in determining how much the defendant, if any, aggravated the sickness and caused the injury which resulted in the death of the deceased, which would not otherwise have occurred, growing out of his previous condition prior to the time he got wet."

"The Defendant requests the court to charge the jury that if they believe from the evidence that the condition of the plaintiff when he entered the cars for a trip to San Antonio, Texas, was sick with lung trouble or consumption and that he knew at that time the condition of his health was such as to increase the chances of injury by exposure, and in such condition he failed to use ordinary care and prudence to protect himself against any contingency that might arise during such journey, and that but for his condition and want of ordinary care at that time, and changed cars by going out in the rain, when by the use of ordinary care he could have avoided doing so, if you believe there was a safer way for him to go, which he might have ascertained by ordinary care and have gone so he would not have gotten wet and failed to do so, then defendant would not be responsible for any injury that did result, if any, in transferring from the Texas & Pacific Ry. cars to the International & Great Northern Ry. cars through the rain and water, if there was such. In arriving at your verdict you will consider all the facts and circumstances in connection with his condition and then determine whether or not he used that ordinary care and prudence which an ordinary prudent person would have exercised under similar circumstances." (Record, pp. 83 to 85.)

There was a verdict and judgment against the Texas & Pacific Railway Company for the sum of $15,250.00, apportioned to the widow and the six surviving children.

A motion for a new trial was duly presented, and, upon proper consideration, was overruled.

The Texas & Pacific Railway Company prosecuted a writ of error

to the United States Circuit Court of Appeals sitting at New Orleans, where the case was submitted upon briefs and oral argument. The Circuit Court of Appeals found no error in the record and affirmed the cause.

The plaintiff in error complained in the Circuit Court of Appeals that the trial court erred in not sustaining a special exception to the effect that the petition showed on its face that the State District Court of Bexar County did not have venue to try the cause; it also complained that the trial court refused to give a peremptory instruction on the ground that the undisputed evidence showed that Bigger's death was not the result of the exposure and wetting he sustained in leaving its train; it also complained that the verdict of the jury awarding damages was excessive, and its remaining assignments of error, which were very numerous, complained of the court's charge and of the refusal of special charges requested.

There were no assignments of error presenting a real or substantial Federal question; no Act or Statute of the United States Congress was either directly or indirectly involved. The action was simple and solely an action for negligence of a carrier, resulting in the death of a passenger. No questions were involved other and beyond such as are ordinarly incident to suits of this character, and the judgment of the United States Circuit Court of Appeals affirming the judgment of the trial court would have finally disposed of this cause, but for the fact that the Texas & Pacific Railway Company enjoys the privilege of operating its road under a charter granted by an act of the United States Congress, a circumstance that has nothing whatever to do with the merits of the controversy, or with any of the assignments of error presented by the plaintiff in error.

All of the questions presented in the United States Circuit Court of Appeals, and now presented in this Honorable Court are of a character which it was the purpose of the judiciary act to submit to the final jurisdiction of the Circuit Court of Appeals, and while this Honorable Court may have jurisdiction merely because the plaintiff in error has a charter granted by an act of Congress,

yet there is no real or substantial Federal question involved, and the assignments of error presented in this court and in the Circuit Court of Appeals are merely such as are usually incident to the trial of an action for negligence.

The defendants in error, by their attorneys, present with this motion to affirm or dismiss, a printed brief and argument in support hereof, which is hereto annexed.

WHEREFORE, Defendants in error pray that this cause be affirmed or dismissed, or that if the motion to affirm or dismiss be not granted, that the cause be transferred for hearing to the summary docket and disposed of.

Fellbaum & Carter

H. Carter

Percy J. Lewis

Attorneys for Defendants in Error

No. 804.

IN THE

# Supreme Court of the United States

—o—

OCTOBER TERM, 1914.

—o—

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

J. T. BIGGER, ET AL, *Defendants in Error.*

—o—

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

—o—

# Brief and Arguments of Defendants in Error

—o—

*Plaintiff in Error has not filed its brief in this Court and, therefore, we will reply to its assignments and points of law as presented in its brief filed in the Circuit Court of Appeals.*

## PLAINTIFF IN ERROR'S FIRST AND SECOND POINTS OF LAW, UNDER FIRST ASSIGNMENT OF ERROR.

This point of law complains that the trial court erred in not sustaining its plea that the suit was improperly filed in Bexar County, Texas, and that, therefore, the United States District Court was without jurisdiction to try the cause.

The brief of Plaintiff in Error in the Circuit Court of Appeals does not disclose what its plea was, but when we turn to the record and read the answer upon which the case was tried, we find that the plaintiff in error had no plea of privilege or to the jurisdiction of the court, but had a special exception, excepting to plaintiff's petition as follows: "For this, that it says that the petition shows on its face that said suit was improperly instituted against the Texas & Pacific Railway Company in the District Court of Bexar County, because it appears from the face of said petition that said defendant is a Federal corporation incorporated under the laws and acts of Congress, having its domicile in Dallas, Texas, and no part of its road in Bexar County, Texas, and as to said defendant, said suit is improperly brought in said Bexar County, and therefore this court or any court in Bexar County is without jurisdiction to try said suit." (Rec., p. 58.)

We respectfully submit that this exception was properly overruled, because plaintiff's petition affirmatively shows that the suit was properly filed in Bexar County. It is obvious that an exception of this kind must be tested entirely by the allegations of the petition, and if the petition does not on its face disclose the want of jurisdiction, then the exception has no merit. Plaintiffs' original petition is found in the record on pages 2 to 6, and it does not show that the Texas & Pacific Railway Company was incorporated by an Act of Congress, nor does it show that the Texas & Pacific Railway Company had its domicile in Dallas County. It does allege that the Texas & Pacific Railway Company is duly incorporated and operates a line of railway from Texarkana to Longview, Texas, and to other points in Texas, and has an agent

in Dallas County, Texas, upon whom service of citation may be had in this cause. (Rec., p. 3.)

After alleging the sale of a through ticket to the plaintiff, and the partnership existing between the three defendants as to passenger business, the petition further alleges "that the agent of the International & Great Northern Railway Company, who sold the passenger ticket hereinafter mentioned to the plaintiff was also the agent and acted for the benefit of the Texas & Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, and service upon each defendant may be had by serving the agent of the International & Great Northern Railway Company, who sold the ticket to plaintiff, as hereinafter set out." (Rec., p. 3.)

The petition also alleged that J. T. Bigger was a resident of Bexar County, Texas, and that the International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, maintained agents in Bexar County, Texas. The record also shows that citation was served on the Texas & Pacific Railway Company by service on its Dallas agent. (Rec., p. 9); also that citation was served on the Texas & Pacific Railway Company by service on its agent, W. L. Holder, local agent in San Antonio, Bexar County, Texas, (Rec., 17); and that another citation was served on the Texas & Pacific Railway Company by service on its agent G. M. Bynum, its local ticket agent in San Antonio, Bexar County, Texas. (Rec., 25.)

The plaintiff in error, Texas & Pacific Railway Company, filed no plea calling in question the agency of the persons upon whom citations were served as its local agents, and it filed no plea affirmatively averring its domicile and pleading its privilege to be sued in a particular district or county.

The record further shows that at the first term of court, after the cause was removed to the United States District Court, all three defendants filed original answers to the merits and did not suggest a want of jurisdiction either in the State or Federal Court. (Rec., p. 29.) At the same term the Texas & Pacific Railway Company was granted leave to amend, and the cause was set for

trial for May 15th, 1913. (Rec., p. 39.) On May 16th, 1913, The Texas & Pacific Railway Company filed its first amended original answer, and in this answer it pleaded to the merits, without reservation, and did not suggest, either by plea or exception, want of jurisdiction in either the State or Federal Court. (Rec., p. 43). On May 16th, 1913, the cause was continued, upon application of all defendants, and, by agreement, the cause was set for trial on the first Monday of January, 1914. (Rec., p. 55.) On January 5, 1914, all parties were granted leave to amend, (Rec., p. 55); and the Texas & Pacific Railway Company then filed its second amended original answer, in which, for the first time, it excepted to plaintiffs petition on the ground that the petition showed on its face that the suit was improperly filed in Bexar County, Texas. The record also shows that while the case was pending in the United States District Court the deposition of J. T. Bigger was taken, and that on January 5th, 1914, the Texas & Pacific Railway Company filed a written motion to strike out certain answers of said witness. (Rec., p. 66.)

The act of the Texas Legislature passed in 1905 (Session Acts, 29th Leg., p. 29), provides that suit against two or more railroads over whose lines a passenger has been carried may be brought against any one or all of such common carriers in any county in which either of such carriers does business, or has an agent or representative; and the act further provides that any agent who sells tickets or makes contracts for the transportation of passengers or property over such lines of railway shall be regarded as the agent of such railway, and service of citation may be had on him. The validity of this statute has been upheld by the highest courts in the State of Texas so often that it is not now an open question:

Texas Central Ry. vs. Marrs, et al, 100 Tex., 530.

M. K. & T. Ry. vs. Blanks (Tex. Sup.) 125 S. W. Rep., 312.

S. L. & S. W. Ry. vs. Wester, 96 S. W. Rep., 769-772.

S. L. & S. F. Ry. vs. Sizemore, 116 S. W. Rep., 403.

If the exception of plaintiff in error were treated as a verified plea, properly pleading its privilege to be sued in some other juris-

diction, it is clear that such a plea must be presented in a timely manner, and its privilege is waived by removing the cause to the Federal Court and there filing answers to the merits, without reservation, and by applying for a continuance of the cause, by agreeing to a setting of the cause and by taking leave to file further amendments. After a party has asserted and submitted itself to the jurisdiction of a court, it is too late then to plead its privilege to be sued in some other Court.

In re Moore, 209 U. S., 490-513.

Western Loan & Savings Co. vs. B. & B. Consolidated Mining Co., 210 U. S., 368-372.

Texas & Pacific Ry. Co. vs. Cox, 145 U. S., 829-832.

In the case of the Texas & Pacific Railway vs. Clara Hill, referred to in the brief of plaintiff in error, a verified plea was filed asserting the railway company's privilege to be sued in some other jurisdiction. As the Hill case was affirmed by this Honorable Court on April 12th, 1915, the question must be treated as definitely settled against the contention of plaintiff in error.

PLAINTIFF'S IN ERROR "THIRD POINT OF LAW."

Under this "Point of Law" it seems to be contended that the court erred in not giving a peremptory instruction in favor of plaintiff in error. This point should not be considered by the court, because there is a failure to call the court's attention to any part of the record which indicates that any such question was ever presented to the trial court. As it is now presented, this court would have to search the record without assistance from the brief, in order to discover if a peremptory instruction was in fact requested and what the action of the trial court was upon it. The statement of the evidence under this point is entirely partisan, and will rather mislead than assist the court, if relied upon.

Should the Court consider the second assignment of error and the third "point of law" based upon it, it will notice that the question of whether or not the plaintiff in error was guilty of neg-

ligence or the deceased guilty of contributory negligence is not raised. The assignment itself and the proposition thereunder is confined to the suggestion that the "deceased's death was not the direct and proximate result of any injury received by the plaintiff while on the defendant's train as a passenger," such assignment, and the proposition thereunder, does not raise the questions which are attempted to be discussed thereunder. The appellate court deciding a case will not go beyond the assignment of error and the proposition thereunder. Therefore, we believe that this Court must assume that there was evidence which justified the trial court in submitting the question of negligence to the jury and that there also was evidence justifying the trial court in submitting the question of contributory negligence to the jury, and the only point that this court can consider under such an assignment is whether or not plaintiff's in error negligence was the "proximate cause of the injury." Thus reduced to the real point which the plaintiff in error raises by the assignment, the ruling must necessarily be against it as the great preponderance of the testimony shows that the "severe drenching" did cause the death of the deceased.

It is an undisputed fact that the deceased was a passenger upon the train of the plaintiff in error, and also an undisputed fact that he was severely drenched at Longview, in making his exit from the train. Before coming to Texas, the deceased was sick, and there is a conflict in the evidence as to whether his illness was due to typhoid fever or tuberculosis. Nearly a year before his drenching, he came to San Antonio, Texas, for the benefit of his health. The evidence showed that his improvement, after reaching San Antonio, was very marked, and just before he started on the return trip to his old home, he was pronounced well by the attending physician. Witnesses who met him just a short time before he reached Longview, declared that he looked like a perfectly healthy man, and there was no testimony that called this fact in question. The evidence showed that when the deceased reached Longview the rain was falling in torrents and it was stormy,

and the water was several inches deep upon the ground, and the deceased testified that he was ordered to alight by the train employes. There is evidence tending to show that the employes went so far as to place the baggage of the passengers upon the ground in the water with the rain falling. There is evidence showing that the deceased had to walk a considerable distance with his baggage before reaching shelter of any kind. The evidence not only showed that the deceased was thoroughly drenched, but it also showed that all of the clothes in his valise were thoroughly wet. It was shown that there was a car in the train that went through to San Antonio, but that the defendant had not informed the deceased of this fact and he did not know it until after he was drenched. The evidence shows that when the deceased reached San Antonio he was beginning to feel the effect of the severe drenching; that he fell into a fever and continued to grow worse until he died. Experts gave testimony tending to show that such exposure of a person who had before been in bad health would be dangerous and would have a tendency to bring about a recurrence of any previous trouble, which probably would not have occurred but for the exposure.

We will now briefly state from the testimony of the various witnesses evidence that supports what we have said. It is not our purpose to state all of the testimony supporting our theory of the case, but only to call the court's attention to enough to show that an issue of fact was raised which must be decided by a jury.

In reference to the deceased's physical condition at the time he left his old home in Kentucky and up to the time he was drenched, he testified as follows:

"Prior to August 10th, 1912, I was able to be up and about and was able to do work. I was not a strong man, but was improving until the time I got wet." (Rec. p. 103.)

Mrs. Ludie Bigger, the wife of deceased, testified as follows:

"The reason he (deceased) came to San Antonio, was because he had typhoid fever and the doctor told him he had lung trouble

and he came for that reason and because he was in a rundown condition." (Rec., pp. 107-108.)

Again, she testified: "Our family physician, Dr. McCormick, told us that my husband had a slight lung trouble after he had typhoid fever and he came to San Antonio the following December after that typhoid fever in August." (Rec., p. 109.)

She further testified: "Before he (deceased) went to Owensboro on this trip, he was a comparatively well man. He had improved so much since he had first come to San Antonio." * * * "I left Owensboro on the 20th day of March, 1912, and came to San Antonio. When I arrived at San Antonio, the deceased weighed 168 pounds and looked the picture of health and there was a marked improvement in his health." * * * "From the time I got to San Antonio up to the time the deceased went back on his trip, he seemed to get along fine, and improved all the time and he increased in weight and strength." (Rec., p. 107.)

The witness, Dr. E. P. Dougherty, testified as follows:

"When I first saw Mr. Bigger (referring to time when he came to San Antonio in 1911), he was in a run down condition"; * * * "he improved very rapidly, as he did just what I told him to do. He slept out of doors all the time and gained about 30 pounds in three months, and he gained more weight off and on until he went back to Owensboro. When he went back to Owensboro his condition was very good and he was able to go to work." (Rec., p. 120.)

He further testified: "When he (deceased) left here for Kentucky, he looked like a well man and he was in good shape and I advised him to go to work, and when he came into my office, he had gained in the neighborhood of 30 to 35 pounds. He had gotten over that condition." (Rec., p. 125.)

Dr. Dougherty further testified that the deceased was a well man when he left for Owensboro. (Rec., p. 125.)

V. W. Fuqua, a witness for plaintiffs, testified: "I knew the deceased in the spring and winter of 1912. Mr. Bigger looked

to me like a strong man; and he looked like he weighed 150 to 160 pounds." (Rec., p. 193.)

The witness, C. E. Callaway, testified for plaintiffs as follows:

"When I first saw him he was very thin and in bad health; and then after he went out to Terrell Wells and came back he had gained about thirty pounds in three or four weeks and one would hardly know him. The improvement in Mr. Bigger was marked and he looked like a well man." (Rec., p. 196.)

The witness, Thomas Boles, testified in reference to Mr. Bigger's physical condition when he first came to San Antonio, as follows:

"When I went out there at the end of a week, he had gained considerable. I brought him in and weighed him and found that he had gained 35 pounds during the six weeks he had been in San Antonio. At that time he had been here about two months and was boarding at my house. He would come down to my place of business every day or so and went with me and helped me considerable while I was out on my work; and he had also helped considerable about my house. At that time he appeared to be in perfectly good health." (Rec., pp. 196-7.)

Again he testified: "I never noticed Mr. Bigger cough at all, and never noticed him cough at night when I was with him. His voice was natural. His voice was never affected; but he had a good clear voice. I saw Mr. Bigger weighed about two weeks before he left, and at that time he weighed 162 pounds." (Rec., p. 197.)

Mrs. Rosa Powers, who was on the train with Mr. Bigger, testified as follows:

"I also observed him before we got to Longview. He was neatly dressed with a black suit of clothes and appeared to be a man in good health." (Rec., p. 114.)

We will now call the court's attention to evidence, which shows that at the time deceased reached Longview, the place where he was ordered to leave the train, the rain was falling in torrents, and it was stormy, and the ground was covered with water, and

that deceased was thoroughly drenched and also that the clothes in his valise became wet.

The deceased testified: "When the train arrived at the station of Longview, either the conductor or the auditor, who was in charge of the train, ordered me to leave the train. It was raining in torrents. I told this party that I did not want to get off in the rain and he stated that I would have to get off, because they could not hold the train there on account of the rain." * * "At Longview Junction on the date mentioned the ground was very wet when I got off. There must have been an inch or two of water where I got off. The rain was falling in sheets. I got off in the rain and took my two grips and had to walk one-third of the distance of a block before I got to shelter, I stopped in a place used as a railroad office. I got thoroughly soaked by the rain. The rain was falling in torrents at the time I got off. I could scarcely see the depot, which was about a block away. I got thoroughly soaked. There did not seem to be a dry thread on me; and my shoes were full of water." (Rec., p. 102.)

"I had to wear my wet clothes from the time I got wet until about 11:30 o'clock that night when we arrived in San Antonio." (Rec., p. 103.)

Mrs. Ludie Bigger, wife of deceased, testified: "I could see from his clothes he had been soaking wet and they were in bad condition. They were still wet and heavy at the time. I hung them out on the line the next morning. The clothes in his valise were also wet, and I hung them out on the line." (Rec., p. 106.)

Mrs. Rosa Powers, a witness for plaintiff, testified: "When we arrived at Longview, it was raining and stormy. It was raining hard." (Rec., p. 112.)

"When I got off the train it was raining hard, just like a cloudburst and the water was at least three inches deep on the ground, and it came to my ankles." * * * "I had an umbrella and the two grips and I got them all together and walked to this little switch house, which was about three car lengths from the car. Mr. Bigger was behind me and when I got into

the switch house and turned around he was was in there too. The porter got back on the car." * * * "He set my grips down on the ground in the water. I noticed the effect the rain had on Mr. Bigger and his clothes. He was wringing, soaking wet, as wet as he could be." * * * "Our train arrived at Longview at 8:30 in the morning, and we arrived at San Antonio at 11:30 that night. I rode in my wet clothes all the way to San Antonio, and I am sure Mr. Bigger did also. The clothes in my satchel or valise were all wet." (Rec., pp. 113-114.)

She further testified: "I guess an ordinary rain would have wet my feet when I had low-quarter shoes on; but this was no ordinary rain; it was raining just like a cloudburst." (Rec., pp. 114-115.)

Defendant's witness, Peter Wyatt, who was a porter on the train on which deceased was riding, testified:

"They (deceased and Mrs. Powers) were both in the rain and it was raining a little. The conductor ran back to where the lady was, as he was surprised to see a lady getting off. The conductor was surprised as he thought I had all the passengers back in the I. & G. N. car. I do not know why the conductor was surprised at two passengers getting off the train if he thought I had them all back. After they got off the conductor thought he would assist them back into the little shanty to keep them from getting wet, so he ran back and assisted the lady into the shanty." (Rec., p. 148.)

We will now call the Court's attention to evidence which shows the bad effect the severe drenching had upon the deceased, and that the drenching was the cause of his illness and death.

The deceased testified: "Having to wear the wet clothes, and from being in the rain and being exposed, caused me to take a deep cold, from which I have never recovered. About a week after that I had to go to bed and have been in bed practically ever since. As stated I took a severe cold, and I suffered with soreness in the chest; had aching in the back and have had chilly sensations all the time ever since then. I have never recovered from the effects

of getting wet." * * * "I have never recovered from said illness and am still suffering from it." (Rec., p. 103.)

The plaintiff, Mrs. Bigger, testified: "I remember his coming home after a trip to Owensboro, Kentucky." * * * "He complained of aches and chilly sensation and aching in his chest and back and in two or three days he begun to have fever and went to bed. After he went to bed he still suffered a great deal with the same hurting in his chest and back and head and he had no appetite at all. He got worse and continued to go down from that time on. He was confined to his bed most all the time after he first went to bed. He was not able to do any work at all after returning from the trip. He arrived home on the 10th day of August, 1912, and died on February 28th, 1913." (Rec., pp. 106-107.)

Dr. E. P. Dougherty, a witness for plaintiffs, testified: "I saw Mr. Bigger about the third or fourth day after his return from Owensboro, I think. He was in a very bad shape; in fact he was in my office and I told him he had better go home and go to bed and stay there. When he was in my office he had a very high fever and was coughing and complaining of his lungs being very sore, and he had a sort of pleurisy." * * * "He continued to decline, and was hardly able to get around and do anything from the time he was in my office, but he began to go right down. After his return from Owensboro, his condition was due to exposure and getting wet in the rain. He had pleurisy and a very bad cough, and I do not think there was any doubt but that was from getting wet. He also had the temperature that goes with that condition. The exposure had, possibly, as physicians say, lighted up the trouble. After his return he simply declined from then on down. I do not remember how long he lived afterwards, but he was never able to get up and down after that. He is now dead. I am qualified to answer the question as to what his condition was after August 10th, 1912. In my opinion he had developed tuberculosis, or, in other words, it had been lighted up and started anew." (Rec., p. 121.)

Again, he testified: "After his return he had fever of 104 or 105 and after he had gotten wet, that would indicate that he had lowered his resistance by exposure. As everybody knows the germ is always in our mouth, and the deceased's exposure had lowered his resistance and had allowed the germ to light up the former condition. That was a new germ. If the deceased was a well man when he left, as I say he was, and he got wet on the train and came to my office four days after getting wet and had fever of 104, I would say that the getting wet gave him consumption. He had consumption from no other cause than exposure and remaining in his wet clothing. I say that the deceased took consumption and died from getting wet and being exposed, and that that exposure caused consumption which he did not have at that time." (Rec., p. 125.)

He further testified: "He came to see me after his return from Owensboro with a history of having gone through this storm. At that time I found that this same lung was very much involved; and he had pleurisy and was running a high fever and was in a sick, weak and run down condition, * * * and as I said he gave me a history of having been put out in the rain and getting his shoes wet and having to keep on his shoes. If a man is once infected with tubercular trouble and he gets well, he can light up the condition in 24 hours time, and he can run a pleurisy and can run a high fever and will be in a weak condition in a very short time. The fact that a party has once been a victim of tuberculosis, though he has gotten well, makes him more susceptible to a recurrence of it after exposure." (Rec., pp. 128-129.)

Dr. E. F. Hertzberg, a witness for plaintiffs, in response to a hypothetical question, detailing the history of the case in question, testified as follows:

"Viewed from a medical standpoint and from my experience as a doctor, there is no doubt in my mind that the severe drenching at the time described was perfectly capable of producing a recurrence of the tubercular condition in the patient." * * * "Therefore I could certainly trace, in my opinion, the condition

of the man in the hypothetical case, and his death directly to the exposure he suffered." (Rec., p. 200.)

Upon cross-examination and in answer to a hypothetical question propounded by the plaintiff in error, giving its version of the case, Dr. Hertzberg testified as follows:

"Under the history just given the only thing I could attribute his condition to would be the severe drenching he received at Longview, because there was no other cause given." (Rec., p. 201.)

He further testified on cross-examination: "Take myself or any perfectly well man who left the Texas & Pacific train at Longview in a rain and walked across to the I. & G. N. train, stopping a while on the way in a shed, and who gets thoroughly wet there; that the time of the year is August; that he gets his clothes wet and gets in the train and comes on to San Antonio, riding from eight o'clock in the morning until 11 o'clock at night, I would say that such a wetting would hurt any man, no matter how strong he is; and it would certainly hurt a man who had previously had tuberculosis. I believe such a wetting would have a detrimental effect on anybody. It may not give him consumption if he is absolutely healthy and strong; but if he has had tuberculosis before and he undergoes the severe wetting of that kind, then he is certain to develop the trouble." (Rec., pp. 202-203.)

The evidence is undisputed that in the train upon which the deceased rode into Longview was an I. & G. N. car, which went through to San Antonio. Plaintiff in error pleaded that such a car was in the train. (Rec., p. 60.)

The deceased testified that after leaving Longview he learned that this car was in the train. He said: "I asked the conductor on the International & Great Northern Railway Company's train, after leaving Longview, about the through coach, and he stated that there was a coach in the train we were then on that was brought into Longview on the train I came in on. He stated that the coach came all the way from St. Louis." (Rec., p. 103.)

The witness, Mrs. Rosa Powers, who rode on the same car with

the deceased, testified that at Texarkana the deceased was sitting across the aisle from her. (Rec., p. 112.) She further testified:

"There was no announcement made in that car at Texarkana with reference to changing cars to go to San Antonio. I heard no such announcement. No one at Texarkana asked me where I was going, and no one there told me to change into another car. Neither did I hear anybody ask Mr. Bigger where he was going." (Rec., p. 112.) "I heard no announcement made by anybody, about changing cars, at Texarkana. I did not hear the brakeman or porter, or anybody else, tell the passengers to change. * * * I heard no one make any announcement at Texarkana, and all I saw there were the sweepers." (Rec., p. 117.)

On the way to Longview and when the train arrived at Longview, Mrs. Powers testified that Mr. Bigger sat several seats in front of her and facing her. (Rec., p. 118.) As to whether any announcements were made by the train employes with reference to changing cars before the train reached Longview, Mrs. Powers testified:

"Before I got to Longview I heard no one make the statement that all people going on the I. & G. N. should change cars. * * * No statement was made by the conductor or auditor that took up the tickets with reference to changing cars." (Rec., p. 112.)

"I did not hear any announcement made at any other station. (Rec., p. 117.) "I never heard anybody announce that passengers should change cars to the I. & G. N. car attached to the train." (Rec., p. 118.)

The testimony further shows that when the train arrived at Longview, the deceased was ordered to leave the train in the rain and storm. He testified: "When the train arrived in the station of Longview, either the conductor or the auditor, who was in charge of the train ordered me to leave the train. It was raining in torrents. I told this party that I did not want to get off in the rain, and he stated that I would have to get off because they could not hold the train there on account of the rain." (Rec., p. 102.)

This testimony is corroborated by the testimony of Mrs. Powers, when she said: "While this was going on Mr. Bigger was standing up by the seat where he had been seated and was talking to the same auditor or brakeman that made the announcement. * * * The porter then carried my two grips and set them down on the outside of the train, and I then got down and Mr. Bigger followed immediately behind me." (Rec., p. 113.)

The undisputed testimony shows that immediately after the train reached Longview the deceased was ordered to get off the train and it further shows that the I. & G. N. car in the train was not taken out of the train until all the passengers had alighted and that even then there was plenty of time and it would have been an easy matter for the train employes to have taken the deceased through the other cars in the train to the I & G. N. car and thus prevented him from getting out in the rain and storm.

Defendant's witness, Wyatt, testified: "The train stops long enough for passengers destined for Longview to get off there before the switching occurs, either in the rear or in the front of the train. Mr. Bigger and the lady had plenty of time at Longview, before the switching was done to have gotten off or have gone back into the I. & G. N. car." (Rec., p. 149.)

Defendant's witness and brakeman, Dehne, testified: "It would have been an easy matter for the train auditor or porter, instead of having the passengers get out in the rain, as the testimony shows they did, to have told them to go back through the train to the I. & G. N. car." (Rec., p. 134.)

There is not a word of testimony in the record to show that the employes of the plaintiff in error made any effort at all, when the train had arrived at Longview, to take the deceased through the train to the I. & G. N. car, or even suggested to him that this could be done, although it had made no provision, at the point where the train stopped to disembark passengers, to shelter them from the inclemency of the weather.

The evidence which we have recited makes out a plain case of liability under the authorities. When a person becomes a pas-

senger upon a railroad he submits the custody of his person to the keeping of the carrier. The passenger owes the duty to comply with the rules and regulations and the directions of the carrier's employes. Such employes designate the car that the passenger is to enter and indicate to him the time when he is to leave such car. The evidence in this case shows that the deceased was ordered to get off the car at the time and place and manner in which he did. He had no other recourse but to obey. Even if there had not have been a car on the train to which he could have been directed without exposing him to the inclemency of the weather, the carrier had no right to thrust him out of the car into the pouring rain and storm a block from the depot without any shed protection whatever. The failure to make such provision to protect passengers from inclement weather, at an important terminal point, certainly raises the issue of negligence. In this case the negligence is greatly aggravated by the fact that there was a car in the train to which the deceased could have been readily directed. Defendant knew of this car being in the train, and that it was going to his destination, and the evidence amply sustains the finding that the plaintiff did not have any such knowledge.

No where in the brief of plaintiff in error is the question properly raised so as to justify this Court in passing upon the question of the deceased's contributory negligence. It is true that in argument in a desultory sort of way, the suggestion is made that deceased was guilty of contributory negligence. However, should the court see fit to pass upon this question, in the absence of its being properly raised, we do not think it will find any difficulty in reaching the same conclusion that was reached by the trial judge. The burden to establish contributory negligence was upon the plaintiff in error. The law will always indulge in the presumption that a person was in the exercise of proper care until the contrary is shown. The question of what a person of ordinary prudence would have done in the situation of Mr. Bigger, after his exposure, depends upon so many contingencies that it is impossible to decide that question as one of law. It is essentially a question of

fact. The urgency to reach home, his financial condition, the length of the wait at Longview, and numerous other elements will all enter into the decision of this question. Upon the issue of ordinary care, it has always been held admissible to prove what other persons similarly situated had done. In this case, the testimony shows that four persons were wet by the rain, and that all of them continued their journey. It would be quite remarkable to hold, as a matter of law, that the deceased was guilty of contributory negligence, when he acted just as the others did who were similarly situated with himself. The deceased had with him his grip and he could reasonably have assumed that he could get dry apparel after he boarded the International & Great Northern train after it had started to San Antonio. The evidence reveals that the contents of his valise were soaked, and thus he may have been disappointed in getting his dry apparel. These are just a few of the facts and contingencies that must be taken into consideration in deciding the question of deceased's ordinary care, and we think that all lawyers must concede that the decision of such a question is one of fact, and to make it a question of law is violative of all settled principles which govern such a case.

The case of G., C. & F. Ry. Co. vs. Shelton, 69 S. W., 653; S. C., 72 S. W., 163, holds that a railroad was negligent wherein the conductor in charge of the train failed to inform a passenger that there were coaches attached to the train in which he might continue his journey and that it was negligence on the part of the railway company to order and command the passenger to leave the train at a place upon its platform that was not a safe place for the passengers to alight. This case also holds that the passenger in obeying the request of an employe was not guilty of contributory negligence.

See also White on Personal Injuries, Section 663.

Louisville & National Ry. Co. vs. Keller, 47 S. W., 1072.

PLAINTIFF'S IN ERROR FOURTH "POINT OF LAW."

Under this "point of law" there seems to be an attempt to call

into question the charge on the degree of care which the carrier owes the passenger. We do not see how the court could consider this "point of law." There is no statement from the record that gives this Court the slightest intimation as to the predicate for the so-called "point of law." The charge is not set out; no facts are recited to show the court that any such charge was erroneous; and it is not even suggested that there was any exception to such a charge. In fact, absolutely nothing is presented and we object to the consideration of the point.

If the Court should consider the point, it will certainly have no difficulty in reaching the conclusion that the degree of care which the court charged is the settled law of this country. It seems to be suggested that because the deceased was to change cars at Longview and thus proceed to San Antonio on the International & Great Northern, that the charge which the court gave on the degree of care took effect after the deceased had boarded the International & Great Northern train and kept up its effectiveness during the whole trip to San Antonio. The court's charge on the degree of care was so applied as to prevent any such wild flight of the principle enunciated. The evidence shows that while the deceased was still on board of plaintiff's in error car, he was ordered from it into the rain and storm. Surely, when the order was given which compelled deceased to go into the rain, he was still a passenger. Therefore, it is clear that the court was justified in charging the jury the degree of care that the law demanded under the existing status.

We deem it unnecessary to cite authorities sustaining the correctness of the court's charge, but will refer the court to a few decisions of the Supreme Court of the United States and of this State. In Pennsylvania Company vs. Roy, 102 U. S., 451, and Indianapolis & St. Louis Ry Co. vs. Horst, 93 U. S., 291, it was held that a carrier of passengers is bound to use the utmost caution characteristic of a very careful and prudent man. The carrier is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against

by the exercise of extraordinary vigilance, aided by the highest skill.

See also the following Texas cases:

M., K. & T. Ry. vs White, 55 S. W., 593.

St. L., S. W. Ry. Co. vs. Parks, 90 S. W., 343.

M., K. & T. Ry. vs. Cook, 166 S. W., 453.

H. & T. C. Ry. Co. vs. Batchelor, 73 S. W., 981.

Ry. Co. vs. Holleren, 53 Tex., 54.

In the case of M., K. & T. vs. White, supra, the following charge was held to be correct: "You are further instructed that while the plaintiff was a passenger on the defendant's train, the defendant owed to her the duty to exercise that high degree of care for her personal safety that a very prudent person would exercise under the same circumstances, and the failure, if any, to use such care, would be negligence."

In the present case the charge criticised is as follows:

"At the request of the plaintiffs you are instructed as follows:

"The defendant, Texas & Pacific Railway Company, owed to its passengers the duty to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances, and the failure to exercise such degree of care would be negligence." (Rec., p. 86.)

As a statement of the law it is absolutely correct, and it is certainly pertinent to the facts, for while Mr. Bigger was a passenger on the Texas & Pacific train it was the company's duty to exercise a very high degree of care for his safety and to avoid an unnecessary exposure in the severe rain then falling. The company knew that Mr. Bigger's destination was San Antonio; it knew there was a coach destined to San Antonio in its train; it knew that an unusually severe rain was falling when its train reached Longview, the junction point. It is perfectly obvious that had any degree of care for the safety and welfare of the passengers going to San Antonio been exercised, they would have been notified of the presence in the train of the San Antonio car and been given an opportunity to make the transfer. Instead of making the trans-

fer, as prudence would have suggested, the employes ordered Mr. Bigger and a lady passenger to leave the car in which they were riding, and assisted them off with their baggage, in a driving rain at a place where there was no protection from the rain. That this exposure was needless is perfectly manifest, and it is equally manifest that if a prudent course had been followed by the employes these passengers would not have been set down in the rain and water, but would have been conducted in safety to the San Antonio car.

## PLAINTIFF'S IN ERROR FIFTH "POINT OF LAW."

This point of law is even in a worse condition than the Fourth "Point of Law." Nothing is cited from the record to sustain it and it is not entitled to the least consideration. It is true that the "Texas Law" does not specify the degree of care a carrier owes the passenger, but the law of this country, which includes Texas, declares that the rule of law is just as Judge Maxey said it was.

## PLAINTIFF'S IN ERROR SIXTH "POINT OF LAW."

This point of law likewise has no support in citations from the record and therefore should not be considered; but inasmuch as the point of law seems to be entirely in our favor, we do not object to the court reading it. It reads:

"It is a question of fact whether an ordinarily prudent person, who was sick with consumption, would have gotten off the train in the rain and then after getting wet, have continued the journey in such condition if there were other means at hand which, if taken, would have saved the said Bigger from the effects of his exposure."

Some of the facts assumed in this "point of law" have no support in the testimony, but the view announced therein to the effect that the point of whether or not the deceased acted as an "ordinarily prudent person is a question of fact," we believe to be a correct statement of law. The trial court agreed with the defendants in error upon the proposition that the jury should be

allowed to pass upon the question as to whether or not the deceased was in the exercise of ordinary care, and we are glad to find that at this particular point in the brief, the plaintiff in error also agreed with us, notwithstanding there may be suggestions and other places in the brief that conflict with this admission.

PLAINTIFF'S IN ERROR SEVENTH "POINT OF LAW."

This point of law, like the others, finds no support in the record and should not be considered. Like the other "points of law," it is not even suggested that there is any assignment of error upon which to base it, and no statement of evidence from the record. In fact, it seems to deal with "sleeping passengers" and "personal notice." We are not aware that any such questions arose in this case.

PLAINTIFF'S IN ERROR EIGHTH "POINT OF LAW."

This "point of law" can not be considered because the court is not referred to any basis for it. Where is the assignment of error upon which the point of law is based? Where is the statement from the testimony to show that the point is well taken? Where is the exception that gave the plaintiff in error the right to complain? Nothing is presented.

PLAINTIFF'S IN ERROR NINTH "POINT OF LAW."

This point of law is in like condition as the others. Nothing cited to show this Court that any such question is in the case. As we have heretofore set out, the deceased was actually aboard the plaintiff's in error train when a negligent act was committed that caused his death.

PLAINTIFF'S IN ERROR TENTH "POINT OF LAW."

This "point of law" is not entitled to consideration because it finds no support in the record as we have heretofore pointed out. An article of the Texas Statute is cited bearing largely upon the

"Jim Crow" proposition. What this has to do with the case which this court is to decide, will always remain a mystery.

PLAINTIFF'S IN ERROR ELEVENTH "POINT OF LAW."

This point of law has no support in the record and is so involved and meaningless that we have not been able to discover just what is sought thereby.

PLAINTIFF'S IN ERROR TWELFTH "POINT OF LAW."

This point of law cannot properly be considered because it is not pointed out wherein it has any support whatever from the record. The evidence shows that the deceased did not know of the presence of the car in the train which went to San Antonio, and, of course, if he did not know of its presence, he was not called upon to go into the car when the time came to make the change. The plaintiff in error did know of the presence of the car, and one of its acts of negligence consisted in failing to direct him to that car rather than ordering him out into the rain and storm where no shelter had been provided for passengers. The court's charge fully and fairly submitted to the jury the question of whether or not the deceased was guilty of contributory negligence in not having gone into the car in question before it was taken out of the train.

PLAINTIFF'S IN ERROR THIRTEENTH "POINT OF LAW."

There is no basis for the Thirteenth "Point of Law" cited in the brief. It is nowhere pointed out what facts sustain the point, upon what assignment it is based, or wherein the plaintiff in error excepted so as to complain. As a matter of fact, there is no assignment of error in this case which raises any such point as is presented by this "point of law" and, therefore, it can not be considered. Under the Sixth "Point of Law," page 67 of plaintiff's in error brief, it is admitted that the question of whether or not the deceased used ordinary care was one of fact, and in the Thirteenth "Point of Law" it seems to be intimated that this admission was

wrong and now the court is called upon to decide the question of ordinary care as one of law. While such a question has not been raised in the brief for the court's consideration, on account of "remarks" made in plaintiff's in error brief, we have referred to the question of deceased's ordinary care in our reply to the Third "Point of Law."

PLAINTIFF'S IN ERROR FOURTEENTH "POINT OF LAW."

This point of law attempts to present the question of the verdict being excessive. No statement is made to show the basis for this contention. No assignment of error, no statement from the evidence, no bill of exception is called to the attention of this court; it seems perfectly clear that the point should not be considered. As a matter of fact, the verdict which was approved by the trial court was entirely moderate. The plaintiff in error insists upon assuming throughout its brief that this court must treat all of its theories of defence as having been established as a matter of law. Upon appeal, the presumption that the judgment is right, must be presumed until the contrary is authentically shown in the manner pointed out by the rules of the court. In all this, the plaintiff in error has absolutely failed. How can this court say that a verdict was excessive when its attention is not called to the evidence which was the basis for the measure of damages? The evidence in this case greatly preponderated in favor of the view that the deceased had recovered his health at the time of plaintiff's in error negligence, and had returned to work; yet, throughout its brief, the plaintiff in error persists in treating him as a dying man. Such a method of handling the case is misleading, and far from commendable. Counsel for plaintiff in error must know that when there is any evidence to support an issue of fact, the appellate court, in deference to the verdict and to the ruling of the trial judge, will treat that evidence as conclusive in order to support the judgment. At the time of his death, the deceased was 49 years old, he was a man of intelligence, had an earning capacity of some $1,800.00 or $2,000.00 per year. He left surviving

him a widow and six children, some of them very young. The court's charge upon the measure of damages was very full and the verdict which the jury rendered was very moderate. The trial court, without difficulty approved the verdict, and even if it were a matter which this court could properly review, we feel confident that judges can not be found who would declare, as a matter of law, that the very reasonable amount awarded in this case was excessive.

PLAINTIFF'S IN ERROR FIFTEENTH "POINT OF LAW."

This "point of law," like the others, finds no support in the record and should not be considered. It seems to contend that because the train stopped that the relation of carrier and passenger had ceased, notwithstanding the passenger had not alighted from the train. Such a contention is so utterly without force that we do not feel called upon to make any reply. The remarks under this "point of law" seem to deal principally with "umbrellas," rain coats, busses, sheds, etc., and we feel that the court does not care to hear from us upon these phases of plaintiff's in error brief.

PLAINTIFF'S IN ERROR SIXTEENTH "POINT OF LAW."

This "point of law" stands out isolated and alone. We have never heard of it before. If there is anything in the entire record that bears remotely upon this "point of law," it has entirely escaped our memory. The record shows that the case was pending in the Federal Court for some time. After the death of Mr. Bigger, plaintiff in error took testimony, obtained leave to amend, pleaded to the merits, continued the case, set the case for trial, and did many other things incident to pending litigation. The record shows that the defendants in error with leave of court amended their petition and made themselves parties. It is passing strange that this isolated, unsupported "point of law" should now be presented to this court.

PLAINTIFF'S IN ERROR SEVENTEENTH "POINT OF LAW."

Under this "point of law," the appellant starts off to complain of the court's charge and seems to wind up with the complaint that a special charge was not given. No reference is made to any assignment of error to sustain any such "point of law" and we think that the court may reasonably presume that there is no proper assignment; there is no statement from the evidence to enable this court to say whether there was error or not and there is no reference to any bill of exception to show that any such point was reserved, and the court is not even told what the "thirteenth charge" contained. Of course, under such circumstances, the "point of law" cannot be considered. As a matter of fact, the court's charge told the jury that they must consider all the facts and circumstances in evidence before them and reach a conclusion, and all courts have practically agreed on the proposition that this is sufficient.

PLAINTIFF'S IN ERROR EIGHTEENTH "POINT OF LAW."

This "point of law," like the others, can not be considered because the basis for it has not been pointed out. No reference is made to any assignment to support it, and no bill of exception is mentioned to show that the point was saved. In fact, it is not a "point of law," but is more in the nature of a misconception of the facts. The evidence clearly sustains the view that the deceased did not know of the presence of the San Antonio car in the train; and there is a conflict in the testimony as to whether or not any announcement was made. The statement of the evidence in regard to this "point of law" is misleading, but even if the statement were correct, it would have no bearing upon a proper disposition of the case in this court.

PLAINTIFF'S IN ERROR NINETEENTH "POINT OF LAW."

This "point of law" cannot be considered under the rules because the plaintiff in error has failed to point out any basis for it

in the record How can this court decide that the point is well taken when there is no citation from the testimony? The contents of the special charge are not recited nor any exception to the ruling called upon to search the record in order to discover possible error. It is the duty of counsel in presenting a case to this Court to show, under each particular point presented, enough of the evidence and the special charge, to give the Court an intelligent understanding of the point sought to be presented. As a matter of fact, the court's main charge and the various special charges which were given at the request of plaintiff in error, contained everything that is presented by the tenth special charge that was in accord with the law.

Following seriatum with the so-called "Points of Law," we are now invited to consider the Twentieth "Point of Fact," and this is an entire misnomer, because the things recited in the so-called "Twentieth Point of Fact" are not in reality facts as shown by the record. Within quotation marks, defendant's witness Crutchfield, is reported as testifying thus: "At Longview there were hotels and stores in close proximity to the depot where Bigger, being a sick man, could have stopped and secured dry clothing, and protected himself." A reference to Mr. Crutchfield's testimony will show that he did not testify as quoted, but the quotation is rather the conclusion of counsel. But seriously, we cannot see what bearing this "Twentieth Point of Fact" could have upon a proper disposition of this case and, therefore, we turn to

PLAINTIFF'S IN ERROR TWENTY-FIRST "POINT OF LAW."

This "point of law," like the others, is not sustained by any reference to any assignment to support it or of any reference to the evidence or other essentials from the record, and therefore, cannot be considered. None of the defendants were dismissed from the case. It is true that the court instructed a verdict in favor of the International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company at

the close of the case, notwithstanding under the authorities they might have been held liable on their through contract of carriage. The plaintiff in error was the active wrongdoer, and it certainly cannot complain because others who are passive wrongdoers were not also held liable.

We have endeavored to reply to each "point of law" presented by plaintiff in error in its brief in the Circuit Court of Appeals, and it is obvious that no error is shown. The Circuit Court of Appeals gave full consideration to the case, and we respectfully submit that the judgment is just and should be affirmed.

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NO. 804.

IN THE

# Supreme Court of the United States

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THE TEXAS & PACIFIC RAILWAY CO.,

Plaintiff in Error,

vs.

J. T. BIGGER, ET AL,

Defendants in Error.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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BRIEF OF

GEORGE THOMPSON,

COBBS, ESKRIDGE & COBBS,

Attorneys for Petitioner.

## GENERAL STATEMENT OF THE NATURE AND RESULT OF THE CASE.

This suit was filed in the District Court of Bexar County on the 5th day of December, 1912, and was on petition of the Texas & Pacific Railway Company removed to the United States District Court and the record filed therein on the 24th day of Ferbuary, 1913.

This suit was filed by J. T. Bigger in his own behalf. Record, page 2.

After said cause was removed to the Federal Court, on the 1st of November, 1913, the Defendants, Texas & Pacific Railway Company and the International & Great Northern Railway Company, filed first General Exception and second General Denial. Record, page 29.

On the 31st of March, 1913, there was a First Amended Petition filed in the name of Ludie Bigger, Charles H. Bigger, James M. Bigger, Ruth H. Bigger, Lucy F. Bigger, Virginia G. Bigger and Robert L. Bigger, suggesting the death of J. T. Bigger, and suing in their own behalf as surviving widow and heirs at law of the deceased. Record, page 30.

On the 1st of May, 1913, Defendant, St. Louis, Iron Mountain & Southern Railway Company, filed a general demurrer and general answer. Record, page 39.

On May 15th, 1913, leave was granted to both parties to amend. Record, page 39.

On May 16th, 1913, St. Louis, Iron Mountain & Southern Railway Company filed its Amended Original Answer. Record, page 39.

On May 16th, the Texas & Pacific Railway Company filed its First Amended Original Answer. Record, page 43.

On November 21st, 1913, the Biggers filed their Second Amended Original Petition. Record, page 47.

On May 16th, 1913, the cause was continued upon application of Defendant. Record, page 55.

On January 5th, 1914, order was granted all parties to amend. Record, page 55.

On January 5th, 1914, the St. Louis, Iron Mountain & Southern Railway Company filed its Second Amended Answer. Record, page 56.

On January 5th, 1914, the Texas & Pacific Railway Company filed its Second Amended Original Answer. Record, page 62.

On January 5th, 1914, the Biggers filed their Supplemental Petition.

The suit was originally instituted by J. T. Bigger himself. Bigger died during the pendency of said suit, and there was no bill of revivor filed herein, nor leave granted to prosecute said suit by any order and decree, save by the so-called Amended Pleadings.

This suit went to trial on the Second Amended Petition (Record, page 47), and Second Amended Answer of the Texas & Pacific Railway Company (Record, page 5), they being only parties before the Court when the verdict was rendered.

This suit was predicated upon a ticket purchased by J. T. Bigger, Deceased, from the International & Great Northern Rail-

way Company from San Antonio to Owensboro, Kentucky, and return, alleging a partnership between Defendants in respect thereto.

It is alleged that the said Bigger on or about the 10th of August, 1912, was returning from Owensboro to San Antonio on said ticket as a passenger, and said train came to a stop at or near the station of Longview, Texas, when it was raining and had been raining prior thereto, and the ground was covered with a solid sheet of water. That after said train came to a stop, Defendant's employees negligently ordered and commanded the said Bigger to leave the train in said rain and water and was exposed to rain and water, whereby he was thoroughly drenched and by reason of said exposure and drenching became violently ill and suffered so severely as to cause his death on February 28th, 1913.

Among other things alleged, the said J. T. Bigger was exposed to said rain and water and his clothes became thoroughly wet and he was compelled to ride to San Antonio, Texas, with his clothes in this condition. That by reason of said exposure he contracted a severe cold and high fever and became violently ill, and caused him to have pleurisy with effusion. That said exposure seriously lowered his general vitality. By reason of said condition so negligently brought about by said Defendants, his general health became so impaired as to render him a physical wreck and invalid, and was constantly confined to his home and bed until he died; and prays a judgment for $15,000.00.

## PLEAS AND ANSWER.

The St. Louis, Iron Mountain & Southern Railway Company and the International & Great Northern Railway Company were by the District Court eliminated from this case.

The Texas & Pacific Railway Company, by way of general exception and demurrer, claimed its right to be sued in the County of its domicile, Dallas County, Texas, and improperly brought in this County and in this Court; likewise excepted to the allegation of partnership and likewise demurred to Plaintiffs' Petition. The Defendant likewise especially answered that the said Bigger had ample opportunity to transfer from one coach to another and that the Texas & Pacific Railway Company had in its train of cars a passenger coach destined for points on the International & Great Northern Railway Company, and if the deceased had used ordinary care would have gotten into said car either when he first entered said train or some other time during the passage of said train of cars over the line of the St. Louis, Iron Mountain & Southern Railway Company, which said Railways transported the said International & Great Northern Railway Company car and the Texas & Pacific Railway chair car over the line of railroads and attached to the train in which the deceased rode, from a point on its line; could have transferred on the said line to the International & Great Northern Railway Company car before reaching Texarkana and at any time thereafter before reaching Longview.

The Texas & Pacific transported the deceased over its line from Texarkana to the town of Longview or Longview Junction, Texas, and when the train reached Longview the Texas & Pacific had performed its duty to said Bigger as a passenger and its relation so far as a passenger was concerned terminated when the said Bigger reached Longview.

The said exposure was the result of his negligence and want of ordinary care for his own safety, in not transferring to the I. & G. N. car but in getting off and standing in said rain and refusing or declining to immediately go to the place of shelter provided for passengers.

Defendant further answering, alleged poor condition of the health of said Bigger at the time of the institution of this suit and his subsequent death were not caused by, and were not the result of any act of negligence, whatever upon the part of the Defendant, and that Bigger was on the 10th day of August, and prior thereto, in an extremely poor state of health and for a long time had been the unfortunate victim of tuberculosis, which said dreadful disease had progressed to such a point as that it had made great ravages upon his vitality and reduced him to the point that he had been forced to abandon his work, and was then returning to San Antonio with hope practically abandoned; that he had surrendered his position at Owensboro, Kentucky, with a definite and final understanding that the only hope for prolonging his life, even a short time, was to leave the climate in which he was residing and return to San Antonio. That the death of said Bigger was the direct and proximate result of said infection and the progressive disease aforesaid, and was not directly and approximately caused by this Defendant, as alleged in Plaintiffs' Second Amended Original Petition.

On the 6th of January, 1914, the Plaintiffs filed their First Supplemental Petition, which was a denial of the matters contained in the answer of Defendant. Said cause was duly tried in said Court on the 8th of January, 1914. Pleas and exception of Defendant were duly overruled. See Order of the Court filed January 8th, 1914, Record Page 91. See Verdict of the jury, January 8th, 1914, Record, pages 86-87. See Judgment of the Court on the verdict of the jury, the judgment and verdict being for $15,250.00, as follows: Ludie Bigger, $5,000.00; Charles H. Bigger, $1,000.00; James Bigger, $1,250.00; Ruth H. Bigger, $2,000.00; Lucy L. Bigger, $2,000.0; Virginia G. Bigger, $2,000.00; Lottie L. Bigger, $2,000.00.

On the 8th of January, 1914, an order was entered staying execution and extending the time in which to prepare and file Bills of Exception. Record, page 90.

January 23rd, 1914, motion for new trial was filed. Record, page 91.

January 23rd, 1914, motion for new trial overruled. Record, page 94.

Bills of Exception. Record, pages 95-256.

Petition for Writ of Error and Order granting the same. Record, page 268.

Assignments of Error, Record, pages 268 to 289 inclusive.

Writ of Error, Record, page 291; Bond, Record, page 293; Citation in Error, Record, page 297.

## PROCEEDINGS FOR THIS COURT ON WRIT OF ERROR.

Judgment of U. S. C. A., Record, page 308; Petition for Rehearing, Record, page 308; Order denying Rehearing, Record, page 318; Petition for Writ of Error and Order allowing same, Record, page 318; Bond on Writ of Error, Record, page 328; Clerk's Certificate, Record, page 331; Writ of Error, Record, page 330; Citation, Record, page 331.

## BRIEF STATEMENT.

For the convenience of the Court we make a very brief statement of the case. J. T. Bigger, Deceased, was a delicate man. He had been working in Owensboro, Kentucky, and becoming sick with typhoid fever, it developed into a case of tuberculosis; he was advised by his doctor to change climate and he came to San Antonio, where he remained out of work

trying to cure himself, for about six months, when he was called back to Owensboro, Kentucky, by his old employers to aid in instructing and breaking in a new man to perform certain labor. He remained there a short time; it was a rainy season of the year, and he undertook to return to San Antonio on his transportation, which he had purchased in San Antonio, a round trip passage. The Missouri & Pacific carried a chair car in its train of cars for the International & Great Northern Railway Company from Little Rock to Texarkana; from there the train of cars were transferred with the car belonging to the International & Great Northern Railway and a chair car belonging to the Texas & Pacific Railway to the Texas & Pacific Railway, Bigger being in the Texs & Pacific car, remaining there all the time. The two cars from Texarkana with other cars, including the sleeper, were delivered to the Texas & Pacific Railway and those two cars were transferred with safety on the Texas & Pacific Railway track to the town of Longview, at which point the Texas & Pacific Railway connects with the I. & G. N. Ry. Co. and departs on its own lines for its other connections, such as Dallas, and other places West. The International & Great Northern Railway coach or car, which was attached in the rear of the Texas & Pacific coach and the Dallas sleeper, were trnsferred to the Interntional & Great Northern Railway at Longview. It was raining when the train pulled out from Texarkana and was again raining when the International & Great Northern Railway Company coach was transferred to the International & Great Northern Railway Company tracks and delivered to the I. & G. N. Ry. Co., the tracks of the International & Great Northern Railway Company being on the opposite side of the depot from that of the Texas & Pacific track. The International & Great Northern Railway Company car transported over the Texas & Pacific was branded in letters showing it to be a car of the International & Great Northern Ry. Co. line, just the same as the Texas & Pacific car was branded showing the car belonged to the Texas & Pacific line, and in plain view of any one entering the

train. Mr. Bigger had ample opportunity when he entered the train at Little Rock and at all other places en route before reaching Longview, to transfer into the International & Great Northern Railway Company car. That the train crew at Texarkana, and before entering Longview, called upon all passengers going on lines of the Interntional & Great Northern Railway Company to transfer into the I. & G. N. Ry. coach and no reason was shown why Mr. Bigger could not transfer, being a man of ordinary intelligence and prudence, neither a minor nor idiot, it was his duty to have made the transfer.

When the train stopped at Longview he had plenty of time to cross over and remain in the shed, which he did, and when the I. & G. N. train was made up, enter the train again. The place where the train stopped was smooth and paved like a floor, and the depot and sheds and everything were in first-class condition. Mr. Bigger had had tuberculosis; had come to San Antonio for his health, which fact was known to him at the time and entirely unknown to the Railway Company or any of its employees, and they were not put upon notice to take any particular care or caution in his case. That there were other passengers on the train transferred to the I. & G. N. coach, who answered to the call made by the train crew, riding on the same car with Mr. Bigger.

The Assignments of Error are as follows (Record, pages 319 to 327, inclusive):

## FIRST ASSIGNMENT OF ERROR.
(Record, page 319.)

In not sustaining the First Assignment of Error to the effect that said suit as to this Defendant was improperly brought in Bexar County, where it had no line of railroad, residence or local

agent, but had its residence and general offices in Dallas County, Texas.

SECOND ASSIGNMENT OF ERROR.
(Record, page 319.)

In not sustaining its Second Assignment of Error, because your Petitioner, under all the evidence as was shown, was entitled to an instructed verdict in its favor.

THIRD ASSIGNMENT OF ERROR.
(Record, page 319.)

In not sustaining the Third Assignment of Error because of the error of the Court in not charging correctly and properly the duty of the passenger in respect to his duty and proper care while a passenger riding in said train, but emphasized too much the duties of the carrier, and extended that duty to apply as to the high degree of care of the railway to the passenger after he had alighted from the train, the same as though a passenger on the train.

FOURTH ASSIGNMENT OF ERROR.
(Record, page 319.)

In not sustaining the Fourth Assignment of Error, for the undisputed evidence showed that Petitioner furnished "adequate accommodations for passengers to alight to change cars" at Longview.

FIFTH ASSIGNMENT OF ERROR.
(Record, page 319.)

In not sustaining the Fifth Assignment of Error, for it was error in submitting to the jury the question as to whether or

not Petitioner forced and compelled Bigger to leave the train, for the undisputed evidence showed to the contrary and such charge was misleading and prejudicial to the jury for it emphasized a fact which, under the evidence in this case, was improper to submit to the jury.

## SIXTH ASSIGNMENT OF ERROR.
(Record, page 326.)

In not sustaining the Sixth Assignment of Error, in instructing the jury the carrier's duty was not discharged by stopping the train at Longview Junction; for stopping the train at a proper and safe place to get off, was a full compliance with that high degree of care it owed Bigger as a passenger on the train. After Bigger left the train, this Petitioner owed him no duty of high degree of care to protect him from rain and getting wet.

## SEVENTH ASSIGNMENT OF ERROR.
(Record, uage 320.)

In not sustaining the Seventh Assignment of Error, for which a carrier owes the very highest degree of care in transporting a passenger while on its train, it does not owe the same degree of care to a passenger after leaving the train to protect him from rain, only ordinary care in preparing proper depot and grounds.

## EIGHTH ASSIGNMENT OF ERROR.
(Record, page 320.)

In not sustaining the Eighth Assignment of Error, for if he was sick with consumption unknown to the Railway, where he

left the train, and but for his said sickness the rain would not have hurt him, the railway would not have been responsible.

## NINTH ASSIGNMENT OF ERROR.
(Record, page 320.)

In not sustaining the Ninth Assignment of Error, to the effect if Bigger knew or could have ascertained by the use of ordinary care there was an I. & G. N. coach attached to the train upon which he traveled from the point he entered the train in which he could have entered and ridden, on or before reaching Longview, which would have protected him from the rain and he would not have gotten wet, the Company would not be liable for his negligence and want of care in taking the safer course.

## TENTH ASSIGNMENT OF ERROR.
(Record, page 320.)

In not sustaining the Tenth Assignment of Error, to the effect that the undisputed evidence showed that the said Bigger was transported without injury by your Petitioner from the place he entered said train to Longview, and whatever injury received was by getting wet after he left the train at the depot in crossing over the grounds of one of the railways, not shown which.

## ELEVENTH ASSIGNMENT OF ERROR.
(Record, page 320.)

In not sustaining the Eleventh Assignment of Error, to the effect that the said Railway did not owe him any duty, certainly any high degree of care, to prevent the rain from falling on him

and wetting him after he left its train to get on the I. & G. N. train.

## TWELFTH ASSIGNMENT OF ERROR.
(Record, page 321.)

In not sustaining the Twelfth Assignment of Error, that the ticket of Bigger required him to leave the train at Longview within a reasonable time after his arrival there and no legal right on said train by virtue of said ticket thereafter.

## THIRTEENTH ASSIGNMENT OF ERROR.
(Record, page 321.)

In not sustaining the Thirteenth Assignment of Error, to the effect not to consider any injuries of the said Bigger unless they find from the preponderance of the evidence he did not contribute in any way to his condition and in order to recover it devolved upon them to show that Bigger exercised ordinary care and prudence in taking care of himself and that his act and conduct did not contribute to the said injuries, followed in an unbroken sequence from injuries received, resulting from the rain and that the same directly and proximately caused and produced the injury they claimed he received, if any, by reason of the water.

## FOURTEENTH ASSIGNMENT OF ERROR.
(Record, page 321.)

In not sustaining the Fourteenth Assignment of Error, to the effect that if Bigger's condition was brought about by reason of his prior condition and acts and conduct thereafter, and that the same would not have occurred except for the result of his

own negligence and want of ordinary care, such as no person of ordinary care and prudence would have done, and that the Railway was not guilty of any negligence resulting from its acts which were the proximate result of his alleged injuries, but was on account of his own carelessness and want of care in taking care of himself, which was the proximate cause of his injuries.

## FIFTEENTH ASSIGNMENT OF ERROR.
(Record, page 321.)

In not sustaining the Fifteenth Assignment of Error, to the effect that Bigger was bound to use all means reasonably under his control to take proper care of himself after getting wet; that it was his duty to have gone to a Hotel or some other place of safety where he could have gotten dry clothing and changed his wet clothing, or otherwise in protecting himself against further damage, or within a reasonable time after reaching San Antonio called a physician and taken proper treatment and if he did not do so was not acting as an ordinary prudent person would act in taking proper care of himself?

## SIXTEENTH ASSIGNMENT OF ERROR.
(Record, page 321.)

In not sustaining the Sixteenth Assignment of Error, to the effect that at the time J. T. Bigger boarded the train for passage to San Antonio, he was suffering from lung trouble or consumption and that he knew this fact, and it was not brought to the knowledge of the Defendant and that he did not provide himself with a change of clothing and carry the same along; such failure was negligence on his part and that an ordinary prudent person under similar circumstances would have secured the same before continuing the trip and that in changing cars

at Longview Junction became soaked with rain and water and the jury should believe that an ordinary prudent person under similar circumstances would have ascertained before reaching Longview Junction that a through San Antonio coach was in the train on which he was a passenger or if a prudent person under similar circumstances would, after having gotten wet, taken care of himself by providing a change of dry clothing, or going to a hotel or some place of shelter, and not proceeded on his journey; and if the jury further believed after getting wet in his then physical condition resulted in any way to the injuries alleged that he would not have suffered except for having been in said physical condition at the time of getting wet; or that if he had had a dry change of clothing and have immediately put them on, or if he had gone to a Hotel or some other place of shelter and not proceeded on the journey he would have avoided suffering the injuries claimed, then Plaintiff would not be entitled to compensation for such injuries against the Defendant.

## SEVENTEENH ASSIGNMENT OF ERROR.
(Record, page 322.)

In not sustaining the Seventeenth Assignment of Error, to the effect that when said Bigger boarded the train he was suffering from lung trouble, knew the fact, of which Defendant was not advised when said train reached Longview Junction, through the negligence of Defendants, or either of them, became soaked with rain, which caused or resulted in any of the injuries complained of, if the jury believe from the evidence that such injuries or illness would not have occurred except for the fact that the said Bigger was at the said time sick, he could not recover.

## EIGHTEENTH ASSIGNMENT OF ERROR.
(Record, page 322.)

In not sustaining the Eighteenth Assignment of Error, to the effect because after the institution of said suit J. T. Bigger departed this life and his widow and minor children were not made parties by Bill of Revivor, as in such cases made and provided, but prosecuted said suit in their name only by amending pleading.

## NINETEENTH ASSIGNMENT OF ERROR.
(Record, page 322.)

In not sustaining the Nineteenth Assignment of Error, in which the Court was requested to instruct the jury, among other things, that all persons and witnesses who swore in the case in the employment of the Railroad Company in the absence of anything to discredit or contradict said evidence could not be arbitrarily disregarded. The testimony of every witness sworn should have due consideration and weight to which in the opinion of the jury as conscientious men seeking the truth, they believe it was entitled to and the employment and business of the witness afford no reason why such evidence, should arbitrarily or without reason be disregarded.

## TWENTITEH ASSIGNMENT OF ERROR.
(Record, uage 323.)

In not sustaining the Twentieth Assignment of Error, that "the law requires all railroad companies in this State to provide and maintain adequate, comfortable and clean depots and depot buildings at their several stations, for the accommodation of passengers, and to keep said depot buildings well lighted and

warm for the comfort and accommodation of the traveling public. If, therefore, the jury shall believe that there were sufficient depot and other buildings at Longview Junction to comply with the law and if they should further believe from the evidence that there were sufficient depot and buildings at Longview Junction, Texas, to shelter passengers and to protect them from the rain while waiting for trains, Defendant would not be liable for any injury claimed as a result of his getting wet from rain, as testified to, which fell on him in transferring from the train of the Texas & Pacific Railway Company to the train of the International & Great Northern Railway Company at Longview Junction, where the journey upon the Texas & Pacific Railway line terminated, if the jury should believe he was transferred with safety and care from Texarkana to Longview and sufficient time given him on the arrival of the said train at the termination of his journey over the line of the Texas & Pacific Railway Company, to get off said train at Longview Junction to take the train of the International & Great Northern Ry. Co. from Longview to San Antonio."

## TWENTY-FIRST ASSIGNMENT OF ERROR.

(Record, page 323.).

In not sustaining the Twenty-first Assignment of Error, to the effect that the increased risk arising from the conditions affecting the fitness of passengers who are sick to journey where they are unknown to Defendant, must rest upon the shoulders of passengers and the jury should give full consideration to all facts and circumstances conected with said Bigger and his conduct from the time he entered the car until he left the same as bearing upon the issue as to whether or not he exercised that care and prudence which an ordinary prudent person under similar circumstances would have exercised, and if he did not exercise ordinary care and prudence under the circumstances

and his act and conduct contributed to his condition, the jury should find for the Defendant.

## TWENTY-SECOND ASSIGNMENT OF ERROR.
(Record, page 323.)

In not sustaining the Twenty-second Assignment of Error, to the effect that the condition of J. T. Bigger when he entered the cars for a trip to San Antonio was that of a sick man and the condition of his health was such as to increase the chances of injury to him by exposure, and in such condition failed to use care and prudence to avoid exposure, which he knew at the time he changed cars, Defendant would not be responsible for any injury that might result in transferring from the Texas & Pacific Ry. to the I. & G. N. Ry. cars unless the jury should believe that such injury would have resulted to him independent of the fact as to whether or not he was sick, in arriving at their verdict and should consider all the facts and circumstances in connection with his condition, and then determine whether or not he used that ordinary care and prudence which an ordinary prudent person would have exercised under similar circumstances.

## TWENTY-THIRD ASSIGNMENT OF ERROR.
(Record, page 324.)

In not sustaining the Twenty-third Assignment of Error, to the effect that the illness of Bigger was traceable to his physical condition at the time he transferred from the Texas & Pacific Ry. to the I. & G. N. Ry. in the rain before he got wet, and that his alleged injuries and complaint was not traceable to the proximate result of Defendant's negligence but to Bigger's own want of ordinary care, which contributed to and was the proximate result of his condition, the jury will find for the Defendant.

## TWENTY-FOURTH ASSIGNMENT OF ERROR.

(Record, page 324.)

In not sustaining the Twenty-fourth Assignment of Error, to the effect that when J. T. Bigger boarded the train for San Antonio, he was suffering from lung trouble or consumption, which was known to him but not known to the Railway Company, and in such condition on his arrival at Longview Junction became soaked with rain, and if the jury believe the injuries resulted from the condition of his health and but for such condition such injuries would not have arisen, they should find for the Defendant.

## TWENTY-FIFTH ASSIGNMENT OF ERROR.

(Record, page 324.)

In not sustaining the Twenty-fifth Assignment of Error, to the effect that if the ills from which he suffered since August 12th, for which he sought to recover damages, was the result of getting wet but such results would not have followed had he used ordinary care and by use of such ordinary care would have avoided getting wet, that the ills from which he suffered would not and could not have been contemplated and forseen by Defendant, Texas & Pacific Ry. Co. and the negligence, if any, of such company was not the proximate cause of such injuries, then they will return a verdict for the Defendant.

## TWENTY-SIXTH ASSIGNMENT OF ERROR.

(Record, page 324.)

In not sustaining the Twenty-sixth Assignment of Error, to the effect that if the jury believed as the train approached Longview Junction its employees passed through the coach in which

Bigger was a passenger and announced that all persons for I. & G. N. points should transfer to another car on said train and if they further believed that said Bigger had he exercised that degree of care that an ordinary prudent person under similar circumstances would have exercised, would have heard such announcement, then the verdict of the jury should go for the Defendant.

## TWENTY-SEVENTH ASSIGNMENT OF ERROR.

(Record, page 325.)

In not sustaining the Twenty-seventh Assignment of Error, to the effect that if Bigger's illness was traceable to his physical condition at the time he transferred from the Texas & Pacific to the I. & G. N. Ry. in the rain and was not traceable to any natural or proximate result of Defendant's negligence, the jury should find for the Defendant.

## TWENTY-EIGHTH ASSIGNMENT OF ERROR.

(Record, page 325.)

In not sustaining the Twenty-eighth Assignment of Error, to the effect that there was no testimony introduced on the trial tending to show the length of lives, tables of mortality, as to the probable length of life of the deceased and no predicate was shown as the basis for damages or the probable length of life of the said Bigger.

## TWENTY-NINTH ASSIGNMENT OF ERROR.

(Record, page 325.)

In not sustaining the Twenty-ninth Assignment of Error, in

refusing to quash portions of the deposition of J. T. Bigger, set out in Bill of Exceptions No. 28; Record, pages 256 to 266, inclusive; to lengthy to set out in length herein, but to which the attention of the Court is respectfully called.

## THIRTIETH ASSIGNMENT OF ERROR.
(Record, page 325.)

In not sustaining the Thirtieth Assignment of Error, as follows:

> "The error of the Trial Court, throughout the case, consisted in the fact that the railroad owed the very highest degree of care to said passengers and not holding that it was discharged in this case:
>
> (1) By transporting him safely to Longview, and for the convenience of passengers, by carrying the International & Great Northern Ry. chair car to I. & G. N. points, which stood in lieu of sheds, etc., at the point of transfer.
>
> (2) And in not holding and charging that the duty to passengers was discharged by carrying said chair car into which the passengers were to transfer, to the I. & G. N. Ry. Co. line at or before Longview, but likewise require it to provide other accommodations for passengers for Longview "where they could alight to change cars and where they would be protected from the inclemency of the weather," notwithstanding a safer way was provided on the train itself, of which J. T. Bigger failed to take advantage of."

## THIRTY-FIRST ASSIGNMENT OF ERROR.
(Record, page 325.)

In not sustaining the Thirty-first Assignment of Error, that

"The verdict was not only contrary to the law and the evidence but the same was highly excessive by reason of his diminished capacity to earn money on account of his consumption, for the amount given the widow and all children as well, as it could never have been earned by the sick man in the future."

## THIRTY-SECOND ASSIGNMENT OF ERROR.

(Record, page 326.)

In not sustaining the Thirty-second Assignment of Error, as follows:

> "It was clearly established by the evidence prior to the time he got wet he had been a sick man and was compelled to leave Owensboro to make his home in San Antonio, and having gone to Kentucky, was returning to San antonio on a train having sleepers therein; got in a Texas & Pacific coach when an I. & G. N. coach was attached for passengers for I. & G. N. points, riding therein practically a day and night, ignoring trainmen's calls to transfer on the train, or see or look for himself, which would have protected him from the rain and his failing to look out or care for himself, which, if he had done so he would have been able to transfer to the I. & G. N. car and saved himself from getting wet, and his own negligence in not so looking out for himself and his want of care as a matter of law in not so doing was the proximate cause of his getting wet and of his death."

## THIRTY-THIRD ASSIGNMENT OF ERROR.

(Record, page 326.)

In not sustaining the Thirty-third Assignment of Error, to the effect that the Court erred in allowing Dr. E. P. Dougherty to testify over the objection of the Defendant as set out in Bill

of Exception No. 6; Record, pages 206 to 211, inclusive; too lengthy to incorporate herein, but to which the attention of the Court is respectfully called.

## THIRTY-FOURTH ASSIGNMENT OF ERROR.

(Record, page 326.)

In not sustaining the Thirty-fourth Assignment of Error, to the effect that the Court erred in allowing Mrs. Ludie Bigger to testify over the objection of the Defendant, as set out in Bill of Exception No. 5; Record, pages 213 to 216, inclusive, to which the attention of the Honorable Court is called, it being too lengthy to incorporate herein.

## THIRTY-FIFTH ASSIGNMENT OF ERROR.

(Record, page 326.)

In not sustaining the Thirty-fifth Assignment of Error, to the effect that the Court erred in charging the jury that the Railway Company owed more than the highest duty to passengers to transport them safely on the train. It did not owe any other duty than of ordinary care to its passengers in providing a safe way for them to transfer from its train, on a through ticket to a car carried for that purpose in its train, provided for through passengers changing to the connecting line while on the train; or to use more than ordinary care in providing a suitable place for passengers leaving said train at the end of their journey to alight at the depot, and in respect thereto it was error to hold the Railway responsible to the highest degree of care to erect shelters to protect such transferring passengers from rain when a safer way was provided to transfer to a suitable I. & G. N. car in transit; and in not holding the Railway Company has discharged its duty, without imposing upon it an additional burden

of providing sheds for passengers to walk under, from the train."

## THIRTY-SIXTH ASSIGNMENT OF ERROR.
(Record, page 327.)

The Court erred in not writing an opinion in this case, discussing at least some of the Assignments, and erred in holding as follows:

> "We find none of the Assignments of Error in this case well taken. With regard to excessive damages see Alpha Portland Cement Co. v. Curzi, 211 F. 580-587, and cases cited."

For this, the undisputed evidence shows that the said Bigger was a sick man and when he entered the train he had an opportunity to get into an I. & G. N. coach, but without using ordinary care got into a T. & P. coach, each one of said coaches being plainly marked and branded, the T. & P. with the initials of its line and the I. & G. N. with the intials of its line in large letters, exposed where any person could have seen them on the coach had they used ordinary care, and if he had exercised ordinary care in getting on the coach, or at any time thereafter, or when the announcements were made through the train, before getting to Longview, he would have had an opportunity to have avoided the rain.

## THIRTY-SEVENTH ASSIGNMENT OF ERROR.
(Record, page 327.)

The Honorable Court of Appeals further erred in not passing on the question of the excessiveness of the judgment in this case, and in holding in effect that said Court could not consider said judgment, for this, that it is in effect a denial of a valuable

right to Petitioner under the laws of Texas, as provided by Article 1631 of the Revised Civil Statutes of the State of Texas; said holding in conflict with the decision in the case of Felton vs. Spiro, 79 Fed. 576; 24 C. C. A. Rep. 327; in effect holding the Court did, in a proper case, have the power to reverse the cause therefor.

While the foregoing Assignments of Error themselves contain distinct propositions of law and are submitted as such, we submit some additional propositions or points of law, arising from the same and in connection therewith, for the consideration of the Court.

## FIRST POINT OF LAW.

(First Assignment of Error, Rec., p. 319.)

The Texas & Pacific Railway Company, a Federal corporation, having its domicile in Dallas in the Northern District of Texas, was improperly sued in Bexar County, Texas, and upon its plea and exception, timely raising that question, should have been dismissed or transferred to Dallas County for trial.

## SECOND POINT OF LAW.

This being a suit for personal injuries it is controlled by the General Laws of Texas, known as the act "Fixing venue of suits against" railroads, passed in 1901, page 31 thereof, and incorporated in Revised Statutes, 1911, as subdivision 26, Article 1830, which provided suits "for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the Plaintiff resided at the time of injury; provided, that if the Defendant Railroad Corporation does not run or operate

its railway in or through the county in which the Plaintiff resided at the time of the injury, and has no agent in said county, then the said suit shall be brought either in the county in which the injury occurred or in the county nearest that in which the Plaintiff resided at the time of the injury, in which the Defendant Corporation runs or operates its road or has an agent."

## POINT OF FACT.

Plaintiff alleged in its original petition (Record, p. 3) that the Texas & Pacific operates a line of railway from Texarkana and to other points in the State of Texas, that it has an agent in Dllas County, upon whom service of citation may be had in this cause. Citation was directed to Dallas County (Rec., p. 7) and served in Dallas on January 13th, 1913 (Rec., p. 9). It was served on W. L. Holder, alleged to be agent of St. Louis, Iron Mountain & Southern Ry. Co. (Rec. p. 11) and agent of the International & Great Northern Ry. Co. (Rec., p. 14), service had on him January 13th, 1913 (Rec., p. 17), and on G. M. Bynum, January 16th, 1913 (Rec., p. 25).

Plaintiff filed first amended petition (Rec., p. 31) for the survivors and heirs of Bigger, in which it was alleged, as in the original petition (Rec., p. 32), "International & Great Northern Railway Company is a railroad corporation duly incorporated under the laws of the State of Texas, and is now and was at the time J. T. Bigger was injured operating a line of railway running from Longview, Texas, to San Antonio, Texas * * * and has an agent in Bexar County, Texas, upon whom service of citation may be had; that the Defendant, Texas & Pacific Railway Co. * * * operates a line of railway from Texarkana to Longview, Texas * * * and has an agent in Dallas County, Texas, upon whom service of citation may be had; that the Defendant, Texas & Pacific Railway Co., is a Railroad Corporation, duly in-

corporated, and operates a line of railway from Texarkana, Texas, to Longview, Texas, and to other points in the State of Texas, and it has an agent in Dallas County, Texas, upon whom service of citation may be had in this cause" (Record, p. 48), as used throughout.

NOTE—We do not know why the clerk copied the citations in the record. Those copied are all on the original petition and served not on an agent of the Texas & Pacific Ry. Co. It was never alleged or claimed it had a local agent in Bexar County. No citation was ever served on any Defendant after the suit was amended, making the survivor and children parties.

The petition controlled and it did not leave that question in doubt and supported Defendants' plea. The Court considered the pleas and overruled them. (See Record, p. 91.)

## AUTHORITIES.

Thse statutes have now been brought forward in Revised Statutes, 1911, as subdivisions 25 and 26, Article 1830. We are not unmindful that this statute was sustained as a venue statute in the case of Railway vs. Blanks, 125 S. W. 312; Railroad vs. Landan, et al, 124 S. W. 746 and I. & G. N. Ry. vs. Doolan, 120 S. W. 1120, **but no question was raised as to its validity,** applicability or pertinency, nor passed upon. If intended as a venue statute in cases where railroads are jointly sued for personal injury for tort committed by another railroad solely in the nature of a personal injury, then it must be held to conflict with the Act of 1901, supra. It cannot be regarded **as an amendment to the law** for it would **not** be in accordance with that provision of the Constitution of Texas, Article 3, Section 36, which provides, "no law shall be revised or amended by reference to its title but in such case the act revised or the section or sections amended shall be re-enacted and published at length. It is there-

fore clear that it is not an amendment of any act nor intended to be. If it undertakes to fix the venue of personal injury suits, it is in conflict with the other law. Hence we take it in order that the whole law may stand it must comply with the provision in Texas Constitution, Article 3, Section 35, "no bill shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to show which thereof as shall not be so expressed." It is easy to harmonize both of these laws and let them stand. For instance, say the Act of 1905 pertains solely to damages, such as loss of baggage or otherwise belonging to passengers and the other act to remain fixing the venu of personal injuries. In Doolan case supra the Court said, "that the same did not undertake to fix liability as against connecting carriers." (P. 1120.) Judge Maxey evidently took this view by dismissing the I. & G. N. from this case. For authorities on these two sections, see Constitution of Texas Annotated from pages 253 to 278 inclusive.

If the said act, however, should be held by this Court to be a valid law and raises no question of jurisdiction, and suit originally maintainable in Frio County, Texas, against the Texas & Pacific Ry. Co., and does "fix liability against connecting carriers" in this case against the T. & P. Ry. Co., that statue therefore, as to jurisdiction, might control the Federal Court. Our contention here is, there would be no waiver of a jurisdictional question by a removal proceeding, since the point was timely raised attacking the validity of the law, and the jurisdiction of the Court for the first time in the Federal Court which could be done as the T. & P. Ry. Co. filed no pleading in the State Court. Our plea was to dismiss the case—not to remand, but drive them out of Court and require suit brought in proper county in proper jurisdiction. Yet the Court held the T. & P. Ry. Co. as the sole Defendant, dismissing the others, when as to it there was no original right to sue in Bexar County.

## AUTHORITIES.

Under the First Point:

Texas Constitution, Article 3, Sections 35 and 36, and authorities cited in Annotated Constitution of Texas by Harris, pages 253 to 278;

Revised Statute, 1911, Subdivisions 25 and 26 of Article 1830;

Ry. vs. Blanks, 125 S. W. 312;

Ry. vs. Blanks, 116 S. W. 380;

Ry. vs. Doolan, 120 S. W. 1120;

Ry. vs. Lynch, 97 Texas 25;

Ry. vs. Wester, 96 S. W. 773.

A plea of privilege is properly presented by exception, Knoles vs. Clark, 163 S. W. 369.

As to joining other Defendants:

The Behrunds Drug Co. vs. Hamilton & McCarty, et al, 92 Tex. R., p. 284;

Goggan vs. Morrison, 163 S. W. 123;

Ragland vs. Insurance Co., 157 S. W. 1178.

That the question of jurisdiction was properly raised and preserved, see:

O'Connell vs. Reed, 5 C. C. A. 593.

## REMARKS.

This question though not raised and presented in the same form was before this Honorable Court in the Clara Hill case, now pending in the United States Supreme Court. This case was

removed to the Federal Court from the District Court of Bexar County, on the petition of Defendant Texas & Pacific Railway Company, as involving a Federal question, the other Defendants joining therein. No motion to remand was made or presented by Plaintiff, J. T. Bigger, or considered by the Court.

## THIRD POINT OF LAW.

(Second Assignment of Error, Rec., p. 319.)

Under the evidence introduced the Court erred in not instructing a verdict for Defendants. The Death of the deceased was caused by his own exposure and want of care and negligence, and was not the direct and proximate result of any injuries received by deceased while he was on Defendant's train as a passenger.

## POINT OF FACT.

After the testimony was introduced, Defendants requested the Court, as contained in Special Charge No. 1, Bill of Exception No. 2, Rec., p. 96, to "instruct a verdict for the Defendant Texas & Pacific Railway Co."

To the requested charge was attached all of the testimony introduced on the trial of the cause. (See Rec. pp. 97 to 203, inclusive.) It is important to quote largely from the testimony in order to show that Defendant was entitled to the requested charge as a matter of law. The testimony upon which it was based is as follows, to-wit:

J. T. Bigger, before his death, testified: "I will be fifty years old the 22nd day of April, 1913" (Rec., p. 101), making him 49 years old at date of alleged injury.

"Was a passenger on the Defendant Texas & Pacific Railway train on or about the 10th of August. * * * Said ticket entitled me to ride as a passenger from San Antonio, Texas, to Nashville, Tennessee, and return. * * * Said ticket was a roundtrip ticket. * * * When the train arrived at the station of Longview either the conductor or the auditor * * * ordered me to leave the train. It was raining in torrents. I told this party that I did not want to get off in the rain and he said that I would have to get off because they could not hold the train there on account of the rain. * * * I got thoroughly soaked by the rain. * * * I was required to remain in the rain a sufficient length of time to walk the distance of the train to the shelter above referred to, which was about one-third of a block. * * * I was also compelled to get in the rain again when I got on the International & Great Northern train after leaving the Texas & Pacific train." (Record, p. 102.) "There was a coach in the Texas & Pacific train upon which I rode into Longview that came through to San Antonio on the line of the International & Great Northern. I know this because I saw the coach and saw people in it after leaving Longview who were not wet. They just remained in this coach and did not get off. * * * I had to wear my wet clothes from the time I got wet until about 11:30 that night when we arrived in San Antonio. HAVING TO WEAR THE WET CLOTHES AND AFTER BEING IN THE RAIN AND BEING EXPOSED CAUSED ME TO TAKE A DEEP COLD FROM WHICH I HAVE NEVER RCOVERED. ABOUT A WEEK AFTER THAT I HAD TO GO TO BED AND I HAVE BEEN IN BED PRACTICALLY EVER SINCE. * * * I WAS NOT A STRONG MAN, BUT WAS IMPROVING UNTIL THE TIME I GOT WET." (Record, p. 103.)

On cross examination the witness stated:

"I first came to San Antonio, December 19th, 1911." (He

resided in San Antonio right along.) Went to Kentucky "and remained there a little over six weeks just prior to August 10th, 1912." (Record, p. 104.) * * * "I stopped at the Bell Hotel, Owensboro, all the time I was there and while there I worked for the Kentucky Electric Company. * * * The names of the physicians who have treated me during the last five years are Dr. McCormick of Owensboro; Dr. Dougherty, San Antonio, Texas. * * * Dr. McCormick treated me for typhoid fever and also for lung trouble. Dr. Dougherty treated me for lung trouble. I also had Dr. Jackson * * * he treated me for lung and stomach trouble. I also had Dr. Wolff treat me for lung trouble." (Record, p. 105.) * * * "It is a fact that my health had been poor for some time prior to August 10th, 1911, but it was improving up to the time I got wet. It was true I had been under treatment."

MRS. LUDIE BIGGER, his wife, testified; she said when he came home:

"I could see from his clothes he had been soaking wet and they were in bad condition. They were still wet and heavy at the time. I hung them out on the line the next morning. The clothes in his valise were also wet. I hung them out on the line. In two or three days he begun to have fever." (Record, p. 106.) "In August, 1911, prior to his first coming to San Antonio the deceased had had typhoid fever. At that time he was confined to his bed four weeks. After having typhoid fever deceased never recovered his full strength while in Kntucky and he then came to Texas and I followed him here in order to make our home in Texas. * * * The reason he came to San Antonio was because he had typhoid fever and the doctor told him he had lung trouble and he came for that reason and because he was in a run down condition. After he came to Texas he did not do any work at all. He went back to Owensboro because the Kentucky Electric Company sent for him to come back and break in a new man;

he was gone on that trip six weeks." (Record, pp. 107-108.) "He had never been sick before that time. He had no sickness to amount to anything before that time except a little grip. He was not very delicate in 1911 until he had typhoid fever. Our family physician, Dr. McCormick, told us that my husband had a slight lung trouble after he had typhoid fever and he came to San Antonio the following December after that typhoid fever in August. The doctor sent the deceased to San Antonio in December. * * * He never moved back to Owensboro because we liked San Antonio. * * * After my husband came here he had a doctor here but not for consumption, he had a doctor for a slight lung trouble. Dr. Dougherty treated my husband for the slight lung trouble. * * * He did not come to San Antonio to make it his home; but he came on account of that lung trouble. From August, 1911, up to the time he died the deceased did not work and drew no salary except during the six weeks he spent in Owensboro, Kentucky." (Record, p. 110.) * * * "It is true that if my husband had been able to live in Kentucky he could have gotten employment by the Kentucky Electric Co.; but he could not live there because his health was run down and the doctors told him he had a slight lung trouble. (Record, p. 110.) * * * He was a little more than forty-nine when he died. (Record, p. 110.) * * * Our oldest son is twenty-two years old, he was twenty-two years old in September. Our next oldest child is sixteen years old." (Record, p. 111.)

MRS. ROSA L. POWERS testified she was on the same train with Bigger. She got on the train at St. Louis and arrived on that train at Longview. (Record, p. 114.) She said she heard no announcement made in the train until the train stopped at Longview. She was a passenger on the train from St. Louis. When she got to Longview she said "first a man came through, either the auditor or brakeman and called out that all passengers should change cars for San Antonio." (Record, p. 112.) She says she inquired whether she had to get out in the rain. The porter

replied, "Yes, I guess so." (Record, p. 113.) " I remember that four passengers got off at Longview. (Record, p. 113.) The porter then carried my two grips out and set them down on the outside of the train and I then got down and Mr. Bigger followed immediately behind me. * * * I had an umbrella and the two grips and I got them all together and walked to this little switch house, which is about three car lengths to the car. Mr. Bigger was behind me and when I got into the little switch house and turned around he was in there too." (Record, p. 113.)

On cross examination, among other things, she said: "They did not put me in the little shed or switch house but I put myself there. I think that the shed or switch house was more than eight feet from the I. & G. N. train on which I embarked but I do not know how much further it was. It was further from the shed than the train I got off of but I do not remember much about that. The man porter told me I would have to get off the train because I said I was going to San Antonio. He said the train I was on did not wait at Longview. He said 'this train don't go to San Antonio; you will have to get off if you are going to San Antonio; this train don't go to San Antonio.' I did not claim that the porter ordered me off the train or that he was giving me anything else but information. I have sued the International & Great Northern for the same cause of action as is involved in this suit. Mr. Bigger and I are the only two of the four that got off at Longview that have sued. (Record, p. 115.) I heard no one make any announcement in Texarkana and all I saw there were the sweepers. I did not hear any announcement made at any other station. I do not remember them calling out for Marshall. I remember the auditor on the train. * * * I do not remember hearing the auditor or the conductor or porter announcing for Longview before we got into Longview. I did not hear any one call out for Longview. * * * When I bought my ticket I was told I could go through without changing. When I got to Longview Junction was the first time I heard the auditor or brakeman make the announcement that passengers should

change cars. (Record, p. 117.) I started at St. Louis at nine o'clock in the morning in full day and I rode all day in going from St. Louis to Texarkana and I did not see any I. & G. N. coach or know there was one on the train. I did not go out of the coach the whole day. I had my lunch with me and I never left the coach during the night or day from the time I left St. Louis until we arrived at Longview. I paid attention to some announcements made before we arrived at Longview. I remember announcements at Popular Bluffs, Missouri, and at Desota and at Bismark." (Record, pp. 118-119.)

DR. E. P. DOUGHERTY testified: "I am an osteopathic physician of San Antonio, Texas. * * * I am not a graduate of a medical school. * * * (Record, p. 119.) Mr. Bigger came to my office the latter part of December or the first of January, 1912, for examination * * * Possibly I examined him several times during those several months and he wanted to know if I thought he could go to work. I told him I did not doubt but what he could, especially if he could get some outdoor work. When I first saw Mr. Bigger he was in a run down condition. (Record, p. 120.) After his return from Owensboro his condition was due to exposure and getting wet in the rains. He had pleurisy and a very bad cough and I do not think there was any doubt that was from getting wet. He also had a temperature that goes with that condition. The exposure had possibly, as physicians say, lighted up the trouble. After his return he simply declined from then on down. * * * In my opinion he had developed tuberculosis or in other words it had been lighted up and started anew. I do not think there was any doubt but what he had tuberculosis. * * * Tubercular patients should, of course, take the best care of themselves and any exposure will help develop such an infection and to lower the rsistance of the patient." (Record, p. 121.)

On cross examination he stated: "The difference between the medical schools and the ostepoathic schools is that in the medical schools and they teach the subject of Materia Medica and in the Osteopathic schools they teach the subject of Osteopathic Mechanics; and every other subject is the same. In the Osteopathic treatment no medicine is given at all and we prescribe nothing. In straight Osteopathy everything is done by manipulation or rubbing. * * * I cure consumptives with good advice; I never use any manipulation at all. (Record, p. 122.) * * * I treated the deceased before he went to Owensboro as his physician. At that time he was tubercular. As a tubercular patient he came to San Antonio to get well. * * * The first time I knew he was tubercular was when he came to my office. (Record, pp. 123-124.) He had consumption from no other cause than exposure and remaining in his wet clothes." (Record, p. 125.)

On re-direct examination the witness stated he refused to make a statement to the claim agent, saying: "I told him if he wanted me to make any statement to go call Mr. Carter and Mr. Fellbaum and I would make a statement. (Record, pp. 126-127.) He gave me a history of having had typhoid fever and of having had a microscopic examination. His tubercular condition was not in advanced stage at the time he first came to San Antonio. The left lung was involved but his right lung was not. The tubercular condition was only in the upper area of his left lung. * * * a patient in that condition with proper treatment has a good chance to recover in this climate with good diet and proper advice before the disease goes too far. * * * I considered him in a fair way to recover under proper conditions, but that it would take proper conditions to do it. * * * He came to see me after his return from Owensboro with a history of having gone through this storm. At that time I found that this same lung was very much involved; and he had pleurisy and he was running in high fever and was in a sick, weak, run down condition. (Record, p. 128.) The fact that a party has once been a victim of tubercu-

losis, though he has gotten well, makes him more susceptible to a recurrence of it after exposure; and he should always take care of himself and nexer expose himself in any way." (Record, pp. 128-129.)

DR. J. B. LACER testified: "My occupation is physician and I have been engaged in that profession twenty-five years. I knew J. T. Bigger during his life. I knew him at the factory where he was employed. * * * Mr. Bigger consulted me and had me examine him and tell him what the trouble was and he dismissed me immediately. * * * That was in July or August, 1911. * * * He asked me to tell him what the trouble was and I told him his left lung was going to the bad very rapidly. (Record, p. 157.) Mr. Bigger was a man that showed every appearance of not being a strong man or a robust man or a well man. My only means of knowing whether he was a healthy, robust man or otherwise was by seeing him at the factory where he worked." (Record, p. 159.)

DR. E. B. McCORMICK testified: " Iam a physician and I have been practicing for thirty-two years. I was Mr. Bigger's physician off and on, not regularly all the time, but I did some practicing for him for several years, probably ten years or something like it. (Record, p. 159.) I treated Mr. Bigger once for typhoid fever, that was in July, 1911, I think, and I treated him before that for influenza and grippe. I never treated him for any fever until he had typhoid fever. The last time I treated him was for some lung trouble. In fact he had tuberculosis. I treated him from about July 22nd up to the 22nd or 28th of August, 1911, at which time he had this lung trouble. I saw he had it and advised him to leave Owensboro. I treated him before he had typhoid fever for influenza, but not since. Following the typhoid fever he had I treated him for this lung trouble. He came to my office off and on for two or three months and I treated him for this tubercular trouble. (Record, p. 160.) When he left Owens-

boro he was not able to work at all. * * * Mr. Bigger was a very unhealthy looking man; he had the appearance of being very unhealthy. I am able to state this because I treated him and advised him to leave Owensboro." (Record, p. 161.)

DR. J. M. COFFMAN stated he was a physician and had been practicing ten years. (Record, p. 162.) "I only know my brother treated him for tuberculosis. I know very little about Mr. Bigber; I never talked to Mr. Bigger myself. I remember that the summer of 1912 was a very rainy summer but I do not know that Mr. Bigger was here during that time. * * * I only know he moved to Texas for his health because he had tuberculosis." (Record, p. 163.)

DR. K. W. COFFMAN testified he was a physician. "Saw Mr. J. T. Bigger professionally in July, 1911, but had known him quite a while prior to that time. I saw him on the 17th, 18th, 19th, 20th and 22nd of July, 1911, in making professional visits to his home. I treated Mr. Bigger on the days mentioned at his home. I only treated him five days and he was suffering from tuberculosis. I made a diagnosis of his case during the time I treated him, both physical and microscopic examination, the result of which was tuberculosis. I did examine Mr. Bigger and I found that he was in the third stage of tuberculosis. Mr. Bigger asked me about changing climates but I never told him it was necessary because he was in the third stage and I knew he was in a very bad condition. (Record, p. 168.) * * * And when he left Owensboro in search of a more desirable climate he was in the third stage of tuberculosis." (Record, p. 169.)

DR. L. B. JACKSON testified: Said he was "a graduate of the University of Texas Medical Department. I knew J. T. Bigber in his life time. I was called in to treat him and I made an examination of his condition. I did that about September 9th, 1912. I found him very weak and very wasted. * * * His temperature was something like 101-102, considerably above

normal and he was coughing and had considerable trouble with his bowels and had diarrhea. I examined his chest and found the signs of a cavity in his lung on the right side and he had tenderness about over his abdomen. * * * After my examination of the deceased I was able to tell what was the matter with him. I made a diagnosis of pulmonary tuberculosis and intestinal tuberculosis. The intestinal tuberculosis was secondary or followed the pulmonary tuberculosis out of the lungs. My diagnosis in his case was that he had tuberculosis of the lungs first with an infection in the intestines; that is, he had an infection of the intestines at the time I saw him which to my mind produced the diarrhea. The trouble in his lungs, however, occurred first. Tuberculosis is of course due to a germ. From my diagnosis I would say that the disease had been going on quite a good while to produce his condition. It takes not less than six months usually to produce the condition he had and probably it would take from six months to two or three years. The getting wet which it is claimed to have occurred on the 10th of August previous, could not produce the trouble he had. I would not attribute his trouble to getting wet on the 10th of August. My reason for that is because the lesion was too far advanced at that time when I saw him. (Record, p. 171.) The third stage means the last stage of tuberculosis. Assuming that the testimony shows that the deceased was examined in July, the testimony shows that the deceased was examined in July, 1911, and that it was found that he was in the third stage of tuberculosis and that he was in bad condition; that he left Owensboro, Kentucky, and came o San Antonio; that he afterwards returned to Owensboro and while he was there it was rainy weather; that he worked there six weeks, I would say that that would have had a tendency to make him worse to go back to the climate or surroundings where he developed the disease. It would have a tendency to develop the disease even where the party is apparently cured. A great many people return to the place where they first took the disease and the disease returns.

If the patient has improved he would certainly grow worse when he went back in the course of events; it stands to reason he should. By growing worse I mean that the disease gets the better of him and it is always harder to get a man out of it after he has gone back and taken a relapse. The traveling up there and working six weeks and then coming back would have a tendency to make his trouble worse, lowers the resistance and lets the disease get the start of him. * * * The fact of his getting wet might have lowered his resistance, which like traveling has a tendency to lower his resistance. * * * However it would not have produced the infection. The getting wet would not necessarily have produced consumption as getting wet does not produce consumption. (Record, p. 172.) The germs were there already and would have worked any way and I guess it was just a question of time when he would have died." (Record, p. 173.)

DR. J. M. WOLFF, practicing physician of San Antonio, testified: "I have had the experience in tubercular cases of a general practitioner. I remember Mr. J. T. Bigger. * * * I saw Mr. Bigger about three times at intervals of a week or ten days, a month or six weeks before his death. He had a very advanced case of pulmonary tuberculosis or lung consumption. He also had tuberculosis of the bowels, which in all human probability would be a secondary infection; or an infection in the bowels caused by swallowing the sputum. At the time I saw him he was passing fifteen or twenty stools a day, with a great deal of griping. He coughed a great deal with this gray, thick tubercular sputum which tubercular patients raise. He was bed ridden and finally died." (Record, p. 178.)

After stating the history of the case, Mr. Bigger's previous sickness in Owensboro, his coming to San Antonio, his returning to Owensboro, coming back to San Antonio, gettig wet, etc., Dr. Wolff said: "Assuming the testimony shows the above facts, I will say that the exposure and wetting would be a very im-

probable cause for the deceased's tuberculosis. As a matter of fact we are all liable to get wet at any time and unless we already have tuberculosis getting wet doesn't give it to us. I would not attribute much effect to the deceased's having gotten his clothes wet and remaining on him in August. At that time of the year it would not produce a severe chilling. It is true that they put patients in packs where they cannot control the temperature." (Record, p. 182.)

On cross-examination, after Plaintiff had put a hypothetical question embracing all of his testimony in the best form, he said: "Assuming that the doctor was right in stating that the patient was able to go back to work and that his temperature was all gone, with that hypothetical case before me, I would say that facts stated, the drenching had nothing to do with producing the infection. It might have had something to do with precipitating or accelerating it; but that would be doubhtful considering the time of the year. But tuberculosis is an infection and one doesn't get it from getting wet; but they get it from getting the tubercle bacilli in their system in some way. I can hardly answer the question propounded yes or no as to whether the wetting of a man and exposing him to the weather and keeping his wet clothes on him place him in a condition that will affect his lungs and reduce the resisting powers of those lungs; but I will say that, for instance, all of us as boys used to go out hunting and get soaking and stay wet all day and not get sick; while on the other hand some other man might get sick who remained out of the rain. As to whether under the facts stated the drenching had anything to do with Mr. Bigger's condition when I saw him, I will say I have to consider in that conection whether or not it was cold enough to produce a chilling of the body. I certainly would not advise a man who had had typhoid fever and who had had tubercular trouble, but who had recovered from it, to sit in his wet clothes all day and until eleven o'clock at night. I would not advise that because it would be disagreeable

even if one had never had any kind of trouble; it would not be the sensible thing to do; but we have so much experience with people getting wet that I do not know that that would cause it. I would not give the getting wet as the cause of Mr. Bigger's trouble unreservedly." (Record, p. 185.)

DR. T. Y. HULL, testified: "I am engaged in the profession of a physician, and am engaged in the special line of heart and lung diseases. I treat tuberculosis. Assuming that the evidence shows the following facts: That in July, 1911, Mr. J. T. Bigger was treated for typhoid fever, and that afterwards it was discovered by a microscopic examination that he had tuberculosis in the third stage; that in December following he came to San Antonio upon the advice of the doctors, and that he remained in San Antonio until the following June; that while he was in San Antonio he gained in flesh; that in June he returned to Owensboro, Kentucky, and engaged in work there for three or four weeks in breaking in a new man in his former position in an electrical business. That while he was in Owensboro, Kentucky, the weather was bad and rainy; that he left Owensboro, Kentucky, and came back to San Antonio via Nashville, Memphis, Little Rock, Texarkana and Longview Junction, reaching San Antonio about 11 o'clock at night on the 10th of August, 1912; that on the way, when he reached Longview Junction on the morning of August 10th, and while he was passing from the Texas & Pacific train to the I. & G. N. train, he claims to have gotten thoroughly wet and drenched; that he came on to San Antonio with his wet clothes on, traveling on the train all day and until 11 o'clock at night; that within a short time, about nine days, a physician was called in and examined him, when he found Mr. Bigger with a temperature of 104 or 105; that from that time on he grew worse; that he had pleurisy, fever, headache and diarrhea; that in September a physician examined him and found he had tuberculosis of the lungs and in the intestines; that his bowels were bad and running off about six weeks be-

for his death; and that he finally died—taking those facts into consideration I would hardly think that the wetting received by him in August, while on a hot train, would have any influence whatever upon the deceased's condition. I say that because during the warm weather obtaining in August, it would really be more of a comfort perhaps than anything else; and another thing, his clothing would not remain wet all day on a hot train in August; and in the case of tubercular patients, where they have hemorrhages we always use ice upon the chest. Patients with hemorrhages usually develop fever and we continue the ice and we have no bad results from the use of ice upon the chest of fever patients, no matter what stage they are in. We also often treat with wet pads around the body, and also in some cases where fever is present we place a wet pack of cold water upon the patient and leave them in that for 12 or 24 hours, and we have never found that had any particular influence upon the patients. So judging from cases of this kind, I do not hardly see how a mere wetting during that time of the year would have a serious influence. The third stage of tuberculosis is the last stage, and is what is commonly spoken of as consumption. When the infection gets into the intestines it is usually the last stage; and that sort of condition usually developes in the last few months of the disease. If the getting wet by Mr. Bigger had any particular effect upon him it would have shown up the next day. The getting wet would have nothing to do with giving him consumption; and his tubercular condition must have existed at the time he got wet. In the case as described, where a man first discovered he had the disease in July, 1911, and he died with it in February, 1913, I think that was the natural course of the disease; and under the conditions mentioned I do not see that the wetting would have had any effect on the patient. In my opinion I do not think he would have recovered whether he got thoroughly wet or not. I have not had my tubercular patients to get wet; but we have gotten them wet in treating them." (Record, pp. 187-188-189.)

On cross-examination, he testified: "Assuming those facts to be true, I will say that if the man was in such apparently good health at that time, the getting wet at that time of the year would not have had any special effect upon him. If he had been in such apparent good health he would have been able to throw off the effect of such a wetting. I believe it would not have hurt him to have gotten wet in August and stay in his wet clothes for 15 hours. The probability is that in the case counsel has described the party had fever beforehand. Assuming that he had no fever at the time, and that immediately after the drenching he was in the condition stated, at that time of the year, and under those circumstances the drenching would not have had any effect on him. Assuming that the man was well at the time he received the drenching and that the headache and pleurisy, etc., followed the next day, it is my belief that the wetting had practically nothing to do with his condition." (Record, p. 191.)

P. F. CRUTCHFIELD, testified: "I am pretty well acquainted with the town of Longview, as I have been running in there about 18 years. There is a hotel about 50 steps from the depot on the south side, called the New Brown, and about 10 steps further down is the Smith Hotel, and also a rooming house and cafe; and there is another one, the name of which I have forgotten adjoining it on the west; and then there is another hotel about 100 yards or 75 yards from the usual place of stopping, called the Model; and right across from the Texas & Pacific tracks at the end of the depot is another hotel; and then comes a store, and just across the street, running east and west, are several stores and a bank building on each side of the street, and a drug store. All these buildings and stores were in plain view from the place Mr. Bigger was in at the shed." (Record, pp. 192-193.)

C. E. CALLAWAY, testified: "I am superintendent of a laundry, the New Process Laundry Company. I am also part

owner of it. I knew Mr. J. T. Bigger during the spring of 1912. I remember seeing him just after he was supposed to have come from Kentucky. At that time he looked run down." (Record, p. 195.) * * * "The first time I saw him he was very thin and in bad health; and then after he went out to Terrell Wells and came back he had gained about 30 pounds in three or four weeks and one would hardly know him." (Record, p. 196.)

THOMAS BOLES, testified: "I knew him about 10 years before I came to San Antonio, and have know him altogether about 14 years. At that time he looked very bad." (Record, p. 196.)

On cross-examination he stated: "I did not suggest to him to employ lawyers; but he told me he wanted to get a lawyer and I investigated the matter and got him a lawyer. (Record, p. 197.) I never heard he had consumption until he got sick; but he had typhoid fever and it had gotten him down. I never heard he had lung trouble. He moved his whole family down here to live, and he came here to live and he boarded with me a part of the time; but I didn't know he had consumption. * * * I knew he could not live in Kentucky so he came to San Antonio. * * * I knew he couldn't live in Kentucky because he was sick, so he had to come to San Antonio." (Record, p. 198.)

J. E. BARNETT, testified: "My name is J. E. Barnett. I live in Fort Worth. My business is that of a brakeman on the Texas & Pacific Railroad. I have been working for the Texas & Pacific Railroad about 12 years, ad am working for said railroad at the present time. It is the duty of the brakeman, and was my duty on the 10th of August, 1912, to go into the Texas & Pacific car and the International & Great Northern car, upon their arrival at Texarkana, and ascertain from the passengers their destination; and then tell them if they are destined to points on the International & Great Northern Railroad to go into the

International & Great Northern car, and if destined to points on the Texas & Pacific to go into the Texas & Pacific car. On August 10th, 1912, I was on Second No. 3 of the Texas & Pacific Railway Company. On that date I went into the respective cars and told the passengers what to do. I asked each passenger individually relative to his destination. The train in question was received from the Iron Mountain at Texarkana, and contained an International & Great Northern coach. I do not know where such International & Great Northern coach came from except that it came in on the Iron Mountain train. The Texas & Pacific car and the I. & G. N. car come into Texarkana coupled together; and at Texarkana an I. & G. N. car is put on the rear end of the train, and the Pullman car going to El Paso on the Texas & Pacific is put between the I. & G. N. car and the Texas & Pacific car. Then when the train reaches Longview Junction the I. & G. N. car is taken off the rear of the Texas & Pacific train and placed on the I. & G. N. train. The train is arranged at Texarkana in order to avoid switching at Longview Junction. At Longview Junction the I. & G. N. car and generally two or three I. & G. N. Pullman are detached from the Texas & Pacific train and put on the I. & G. N. train. On the 10th of August, 1912, I stopped at Marshall. The reason for that was because the train I was on consolidated with another train and I turned at Marshall and came back. I do not remember whether there was two sections of it or not but the first No. 3 came and we came on behind it. I was on what was known as No. 3, but I don't remember whether it was the first or second. I am positive I made the announcement to each passenger as stated above on August 10th, 1912, as I do that every trip and those are my instructions. (Record, pp. 97-98.) I make this announcement only at Texarkana. Sometimes the coach destined for Texas & Pacific points is an Iron Mountain coach or a Missouri Pacific coach and sometimes it is a Texas & Pacific coach. I do not know whether the Texas & Pacific coach was so marked on the occasion in question, or whether it was a Missouri Pa-

cific or Iron Mountain coach; but we always find out which coach is destined for Texas & Pacific points and which coach is destined for I. & G. N. points. A passenger boarding the train can distinguish an I. & G. N. coach from a Texas & Pacific or a Missouri Pacific coach by the fact that the I. & G. N. coach is plainly marked I. & G. N. on the outside. All the care are marked so one can read what they are. I remember the occasion in question and that I made the usual announcement." (Record, p. 99.)

On cross-examination he said: "I know that I informed the passengers that the I. & G. N. car went on the I. & G. N. train on the occasion in question because I do that all the time. That is the only way I know I told them upon the occasion in question. I go to each passenger and tell him to go into the I. & G. N. car in order to avoid changing at Longview. Sometimes the I. & G. N. car, which I instruct the passengers to enter, is ahead and sometimes it is behind; it is not always in the same position in the train. It is my duty to point out the car which carries the passengers to their destination, and I always try to perform that duty, of course. * * * From Texarkana to Marshall is 67 miles. I gave no notice to the passengers to change after we left Texarkana." (Record, p. 100.)

W. P. DEHNE, testified: "I am a brakeman on the Texas & Pacific Railroad. I remember being on the Texas & Pacific train on the 9th or 10 or 11th of August, 1912, at Longview. I was a passenger brakeman coming into Longview Junction at that time. At Longview there are two sleepers and a coach taken from the Texas & Pacific train and delivered to the I. & G. N. At Longview I have charge of those two sleepers and the I. & G. N. coach. If I have any passengers to get off there I get them off and then remove my markers and put them on the rear sleeper on the El Paso part of the train, or the last car of the El Paso end of the train. Upon the occasion in question I

went back and removed my markers as stated and put them on the back end of the El Paso part of the train. I do not know anything about announcements being made by the conductor, auditor, brakeman or porter except in my end of the train. I make announcements only in my end of the train and I do not go up into the El Paso chair car or the Fort Worth and Dallas chair cars. I remain in the rear end from the I. & G. N. coach back and make announcements for passengers to get off at Longview Junction and Longview City myself. The I. & G. N. coach comes from St. Louis. It is a regular coach or chair car. We had only one I. & G. N. coach on the occasion mentioned and that came from St. Louis. At Texarkana there was a sleeper put in between the chair car and the coach. I did not go through the sleeper into the Texas & Pacific chair car. The I. & G. N. car was switched immediately upon its arrival at Longview. The switch engine was ready to take hold of it when we stopped; and I hardly had time to take off my markers. The I. & G. N. coach was pulled back and shoved down the I. & G. N. track to the place the I. & G. N. train pulls out from. As near as I can remember the I. & G. N. track is about 10 or 12 feet from the switch shed or shanty. It is about 10 or 12 feet from where the I. & G. N. coach would stop. One would have to walk about 10 or 12 feet from where the I. & G. N. coach would stop. One would have to walk about 3 or 4 steps only from the coach to the shanty. The car shanty in question had a door on one side facing the T. & P. track and the I. & G. N. tralks run to the back of it and there is no door on the side facing the I. & G. N. track; one would have to go through the door facing the Texas & Pacific track. There were other depot building there. There were the switchmen's shanty, the yard office, the telegraph office and the depot building. The distance between the point where the Texas & Pacific train stops and the point where the I. & G. N. train starts would not be more than 25 feet. The depot buildings, and sheds were between the two tracks. There were floors to the buildings mentioned, and the floors were above

the ground. Where the Texas & Pacific train stops it is paved with gravel and cinders and such as that and it affords very good walking. I do not remember Mr. Bigger or Mrs. Powers getting off at Longview Junction on the date mentioned. On the day in question we had just been having some very heavy rains and at Marshall it rained very hard; and it had been raining up to the time we reached Longview but there the rain had ceased. The rain had held up some there. I got off the train but I did not get wet. I walked around in the yards there. I did not get wet in the yards on that occasion; but after we left the yards I did. Before the Texas & Pacific train pulled out I did not get wet. We were out in the yards fully 20 or 25 minutes, during which time I was out on the ground, watching my train, looking after my car and testing the air hose and heat and placing the markers, and seeing that the men tested the air before they got through. During all that time I was outside of the train." Record, pp. 130-131-132.)

H. F. BODECKER, testified: "I am in the ice and ice cream business at Dallas. I have been in that business for 15 years. I have been engaged in that business since I was auditor on the Texas & Pacific. I am not now in the employ of the Texas & Pacific Railroad. I was auditor for that company in August, 1912." (Record, p. 135.) "While taking up the tickets after leaving Texarkana I made the announcement that if it was not raining at Marshall that passengers in the Texas & Pacific car for I. & G. N. points should go back to the I. & G. N. coach on account of their not being able to pass through the Pullman in the small hours of the morning as it was against the rules of the Railroad Company and the Pullman Company to do so. I made that announcement when I lifted the tickets between Texarkana and Atlanta. I made that announcement to every passenger that had an I. & G. N. ticket, that I found in the Texas & Pacific coach. I told them there was an I. & G. N. coach which went through to San Antonio and I notified them to make

the change at Marshall because it was raining there. They would have to get off the train at Marshall to make the change as it was still in the early hours of the morning and people were asleep in the Pullman and they were not allowed to go through the Pullman cars. I stopped them from changing at Marshall because it was raining there. Before reaching Longview I and the porter announced that the passengers could go through the rear of the train to the I. & G. N. car. They were told to go through the sleeper. That was the next morning and the passengers in the sleepers were up. I am positive I did that. Before I got to Longview I took up the tickets and returned a portion to the passengers. I gave them checks at Marshall to indicate who they were, whether Texas & Pacific or I. & G. N. passengers. I gave every one a check that I took tickets from. Sometimes we do not give them all checks because we can remember them. I do not remember Mr. Bigger on this occasion. In a case of that sort, where I did not know the passenger I give him a check. I am positive I made the announcement with reference to the I. & G. N. car. I made that announcement between Marshall and Longview Junction and closer to Longview than to Marshall. I made that announcement all through the car. I am positive of that because of the rain at that time. I could not be mistaken about it. The porter was with me and made the announcement right behind me." (Record, pp. 136-137.)

On cross-examination he said: "I do not look at passengers' tickets until after the train leaves Texarkana. The porters and brakemen are parties that stand at the entrance of the cars and look at the tickets of the passengers; and at Texarkana they are supposed to go through the train and tell the passengers for I. & G. N. points to go back to the I. & G. N. coach." (Record, p. 137.) "It had been raining rather hard that day, and it is a fact we were turned back by a washout after leaving Longview, and we came back and took breakfast at Longview. We left

Texarkana at about 1:10 in the morning and got to Longview at about 8 or 9 o'clock, though I am not positive of that. The chair car was nearer the engine than the I. & G. N. car, and there were two Pullman cars, or maybe just one, between the I. & G. N. car and the Texas & Pacific chair car. It is against the rules of the Pullman Company to allow passengers to go through the Pullman cars before the guests are up in the Pullmans. I refused to let them go through and told them not to try to do so. And I did not want the passengers to go out in the rain. When we arrived at Longview the cars were in the same position, with the Pullmans between the I. &. G. N. and the Texas & Pacific cars. At Longview I saw one lady get off the Texas & Pacific chair car and saw the conductor assist her to the switch shanty. That was the only passenger I saw alight. When she alighted it was not raining very hard if it was raining at all." (Record, p. 138.) "In answer to the question as to whether or not it would have been an easy matter for the employees of the Company to conduct the passengers through the one or two sleepers back to the I. & G. N. coach rather than allowing them to get out in the rain, if it was raining, I will say that the employees did do that. I stood between the first car and the Texas & Pacific chair car and assisted several ladies across there myself. Assuming that some passengers did get out the car and that the porter set their baggage down on the wet ground, it was probably done because the passengers waited so long that the San Antonio car had been cut off of the train and put on another track. The employees of the company are supposed to take the cars from the train as soon as the signal is given that the cars are ready. The passengers are given plenty of time to alight. I do not know whether they are supposed to couple on to the cars until the passengers get off. When I first saw the conductor approaching this lady to assist her he was coming out of the dispatcher's office. I could not say just how far the dispatcher's office is from the shanty, but it is about 15 or 20 steps I suppose. I first saw the conductor when he

came out of the dispatcher's office. I do not remember exactly how he went to the lady, but I think he walked right fast. He had five or six steps to walk after he reached the lady. She had walked possibly 5 or 6 steps before the conductor reached her. He was rushing along to help her with her baggage a distance of five or six steps. That would make it about 14 steps from the place she got out of the car to the shanty." (Record, pp. 139-140.) "I was standing at the end of the El Paso sleeper next to the Texas & Pacific car when the people were leaving it at Longview. The switch engine had not taken charge of the train at that time, when I was assisting these people across. The porter carried the passengers' baggage through and I assisted them. I could see that all the passengers did not leave, and some of them were not supposed to leave. I always give the notice to passengers to change cars and that is the reason I feel I did it in this case." (Record, p. 141.)

PETER WYATT, testified: "I was a porter on the Texas & Pacific train on August 10, 1912. I made some announcements to passengers in the Texas & Pacific car who were destined to San Antonio and other I. & G. N. points. I made the announcement after leaving Marshall, at Lansing, about 6 miles before reaching Longview. The usual place for such announcement is anywhere between Marshall and Longview, and when I get to Longview I call it again. Whenever we have the I. & G. N. car connection I work the Texas & Pacific chair car until we get to the connection. I worked in the Texas & Pacific chair car on this occasion. After leaving Marshall, I was instructed by the conductor to go back in the Fort Worth chair car and see if there was any passengers for I. & G. N. points and I always do that. Before reaching Longview I always go back and say, 'Longview Junction will be the next station. All passengers for I. & G. N. points will go back through the sleeper to the I. & G. N. coach, change for Houston, Galveston, San Antonio, Austin and Laredo, and don't forget your baggage,'

and I assists several ladies and several gentlemen with their bags and grips from the Fort Worth chair car, and the train auditor stands in the rear of the Fort Worth chair car and assists the ladies in crossing; and I calls three times, 'Longview Junction, change for Houston, Galveston, Austin, San Antonio and Laredo, and don't forget your baggage.' I also called again, 'Longview Junction, change for Houston, Galveston, Austin, San Antonio and Laredo, and don't forget your baggage,' and when the train approaches Longview, I calls again, 'Longview Junction, change for Houston, Galveston, Austin, San Antonio and Laredo and don't forget your baggage,' calling three times just like I did at first, and I put my step box down and a lady gets off and a gentleman follows; and after the lady gets off the step she asks me about the I. & G. N. and I said, 'where are you going to?' and she said, 'San Antonio,' and I asked her, 'Why didn't you transfer?' and she didn't say anything and then the conductor came and assisted the lady to the switch shanty." (Record, pp. 142-143.)

On cross-examination he stated: "When I got to Longview I said, 'Longview Junction and change for Houston, Galveston, San Antonio, Austin and Laredo, and don't forget your baggage.' I will swear that it was what was halloaed, and that is what I swore to in the State Court, and I am swearing to that now. Before reaching Longview Junction I said, "All passengers can go through the scleepers to the I. & G. N. coach.' I make different announcements at different times." (Record, p. 144.) "I am positive I notified the passengers to get off at Longview. The lady had plenty of opportunity to get off the train after it stopped at Longview before the switching occurred. Passengers often get on the Texas & Pacific car between Marshall and Longview and have plenty of time to get off at Longview. The train stops long enough for passengers destined for Longview to get off there before the switching occurs, either in the rear or in the front of the train. Mr. Bigger and the lady had plenty of time

at Longview before the switching was done to have gotten off or have gone back into the I. & G. N. cars." (Record, p. 149.)

R. H. ADKINS, testified: "I am the conductor on the Texas & Pacific train from Texarkana to Fort Worth. I remember testifying in the State Court in the Powers case. On August 10, 1912, I was the conductor on the Texas & Pacific passenger train from Texarkana to Fort Worth, known as Train No. 3. I gave instructions for announcements to be made. I gave those instructions to my porter. After we left Marshall, and about 10 miles east of Longview Junction, I instructed the porter to go back through the Pullman cars and announce that all passengers for I. & G. N. points, Houston, Galveston, Austin, San Antonio and Laredo, should go back through the sleepers into the I. & G. N. chair car or coach as it was raining and it would save them from getting wet at Longview Junction. * * * The porter went back after I had given him those instructions. When we arrived at Longview Junction my porter proceeded to unload the passengers from the chair car; and I went up in the smoker so as to be near the telegraph office. We only had two passengers to unload there. We had no local passengers for Longview, and the only passengers we had for that point were through passengers from St. Louis and Little Rock. As I came back I saw a lady getting on the ground and I ran back and asked her where she was going and she said she was going to San Antonio; and I said, 'Why didn't you go back through the sleeper and save getting out in this weather?' She did not answer my question. I picked up her grips and carried her to what we call the switch shed and then went back and got my orders and mail. I told the lady to wait in the shed a few minutes and the I. & G. N. coach would be cut off the Texas & Pacific train and set opposite the switch shanty and she could then get out of the switch shanty into the I. & G. N. coach and save getting wet. There was a gentleman with the lady, and he followed her into the switch shanty. The gentleman could hear what I was

telling the lady. They went into the shanty and I left them there. The shanty had a floor to it and was about 12 by 14 feet I guess. * * * At the request of counsel I have exhibited my drawing to the jury and indicated to them what the different objects were on the drawing. I have placed the train in the drawing in the exact position it was on the day in question and as it was on every day I have noticed it, and have also measured all the distances. The train which I had in charge on August 10, 1912, was made up of Missouri Pacific Mail Car, No. 2129; Missouri Pacific baggage, 4115; Texas & Pacific coach, 405; Missouri Pacific chair car, 8025; Pullman, 180; I. & G. N. coach, 107, and the three Pullmans behind the I. & G. N. coach, which were delivered to the I. & G. N. I had no Missouri Pacific coach on that train which went to the I. & G. N. at all. The coaches in the train were all plainly marked. The Texas & Pacific coach was marked plaintly, 'Texas & Pacific, 405. This train on account of running through to St. Louis is made up of Missouri Pacific, Texas & Pacific and I. & G. N. equipment, and coming back it is also made up that way. The train runs through from El Paso to St. Louis. The coaches are all marked plainly and distinctly. Coming into Texarkana the Texas & Pacific and the I. & G. N. or the Missouri Pacific and I. & G. N. coaches are coupled together. They are arranged that way at St. Louis. That is on an all day run. I saw the I. & G. N. coach placed opposite this switch shanty just before the time I got there. I made the sketch exhibited to the jury from data I had in my book. The photographs handed me are perfect pictures of Longview Junction. The first one shows the depot facing north and towards the Texas & Pacific track. The next is a photograph of Longview Junction facing east. There have been no changes made in the buildings there since these photographs were taken, and they are a fair and correct representation of affairs as they are now. The lady would have had to walk about 15 ordinary steps to get to the shed from the place she got off the car. The shed was nearer to the car than the depot, and it was also nearer

the car after the I. & G. N. train was made up than the depot. It was really the most convenient place to take the lady for all purposes. It is about 8 ordinary steps from the shed to the I. & G. N. coach. It is the same distance from the Texas & Pacific track to the buildings as from the I. & G. N. track to the buildings. It is between 10 and 12 feet from the track we came in on to the depot and it is about the same distance from all the buildings; and it is about the same distance from the buildings to the track where the I. & G. N. train runs. In other words, these buildings were half way between the two tracks. They were sufficient to protect the passengers. The ground there was graded, having a fall of 5 or 6 inches from the Texas & Pacific track to the I. & G. N. track. It was raining but the walking there was good. The platform there was made of sand and gravel." (Record, pp. 150-151-152-153.)

P. F. CRUTCHFIELD, testified: "I am a conductor on the I. & G. N. Railroad. The name on the back of the ticket handed me is my name. The ticket has my punch marks on it, but I did not put my name on it. I identify the ticket as one I took up from some party on the train on the 10th of August, 1912. I remember something about a big rain we had about the 10th of August, 1912. I remember having a whole lot of passengers at that time, but I do not particularly remember Mr. Bigger. I remember that on the date in question I went up there and had two passenger cars leaving Palestine going after Second No. 3. At that time it had been raining awful hard. At the time the Texas & Pacific train arrived at Longview, it was just sprinkling a little bit though it had been raining awful hard, and it had rained what I should call 'the bottom dropping out.' When the Texas & Pacific train arrived it had been some 10 or 15 minutes since the hard rain. I remember that distinctly. My run is from Palestine to Longview Junction and from Palestine to Mineola. On the date in question I was running from Palestine to Longview. On the date in question there were three

Pullman cars on the I. & G. N. from San Antonio and Laredo." (Record, p. 156.)

## AUTHORITIES.


| | Page. |
|---|---|
| Revised Civil Stat. of Texas (1911), Art. 6693 | 57 |
| American & English Ency. of Law | 65, 66, 67 |
| Bowen vs. N. Y. C. Ry. Co., 18 N. Y. 408 | 58 |
| Brunswick & W. R. Co. vs. Wiggins, 113 Ga. 842 (61 L. R. A., 113 and notes) | 69 |
| Davis vs. H. & T. C. Ry. Co., 59 S. W. 844 | 60 |
| G. C. & S. F. Ry. Co. vs. Guess, 154 S. W 1061-62 | 63 |
| H. & T. C. Ry. Co. vs. Batchler, 73 S. W. 981 (37 Tex. Civ. App. 116) | 58 |
| I. & G. N. Ry. Co. vs. Welsh, 86 Tex. 204 | 65 |
| Louisville & N. Ry. Co. vs. Keller, 47 S. W. 1073 | 59 |
| M. K. & T. Ry. Co. vs. Hagan, 93 S. W. 1017 | 63 |
| Munn vs. Ry. Co., 51 Am. Rep 284 | 65 |
| Nun vs. Georgia Rd., 51 Am. Rep. 287 | 60 |
| Railway vs. Butchers, 83 Tex. 316 | 58 |
| Railway vs. Halloren, 53 Tex. 54-56 | 57 |
| Railway vs. Walsh, 78 Ill. App. 595 | 60 |
| Railway vs. Missildine, 157 S. W. 247 | 63 |
| St. L. A. & T. Ry. Co. vs. Finley, 79 Tex. 88 | 61 |
| Street on Personal Injuries in Texas, Sec. 358, 394, 396 | 69 |
| Texas & Pacific Ry. Co. vs. Miller, 79 Tex 78 | 59 |
| Texas & Pacific Ry. Co. vs. Bingham, 90 Tex. 227 | — |
| Texas & Pacific Ry. Co. vs. Cole, 66 Tex. 563 | 62 |
| Wood vs. New York Central Ry. Co., 17 Am. Neg. Cases, 276 | 65 |
| White on Personal Injuries on Railroads, Vol. 2, page 1075 | 64, 68 |

## ARGUMENT.

He got on the Texas & Pacific passenger coach. He knew or could have known, at Little Rock there was an I. & G. N. coach attached that he could have gotten on; he could, by the exercise of ordinary care, found out the fact; he was not deaf, neither a minor nor idiot, and should have heard the announcement of trainmen directing passengers to pass out of Texas & Pacific coach to the I. & G. N. coach. Should at some time during the route have looked and listened.

The place where he left the train was a suitable place to walk. There were sheds and depots and other buildings to protect him from the rain near at hand. If he got wet and got his clothing wet there was a comfortable hotel in Longview where he could go to put on dry clothes. No prudent man, if sick, as he is shown to have been, would have traveled all day in wet clothing. There were Pullman sleepers attached to the train. The T. & P. could not be held responsible for his traveling, after he ceased to be its passenger, or in traveling on another train, in wet clothing, which showed his want of care. Getting wet, leaving a train at a station to cross over to another train, instead of getting in the same coach while attached to the same train he left, is not one of the things **per se** can be charged as an act of negligence to the railway, but **per contra.** After leaving the station he got wet again, getting in I. & G. N. train where he rode all day in wet clothes. Bear in mind he knew all about these cars as he had made the same trip before on the same ticket, to say nothing of his prior trip.

He had ceased to be a passenger when he left the train. Surely he was no longer a passenger of the T. & P. Ry. Co. in the shed or house and when he left it to go to I. & G. N. train and while wet on that train. Obviously the T. & P. owed him no further duty after he left its train.

## ASSIGNMENTS RAISE QUESTIONS.

We do not think it necessary to consider the Assignments of Error in detail, though relied upon and insisted upon.

The **First** raises the question of jurisdiction. Assignment Record, p. 319; Plea of Defendant, Record, p. 58; Bill of Exception No. 1, Record, p. 95; Order Overruling Plea, Record, p. 91. Discussed above.

The **Second** (Rec., p. 319) is the request made by Defendant for a Peremptory Instruction. Special Charge No. 1, Bill of Exception No. 2, Record, 296. Discussed above.

The **Third** (Rec., u. 319), the error contained in the Court's General Charge taken and preserved at the time. Bill of Exception No. 3, Record, 204.. Did not charge on the subject of the duty of passenger; emphasized too much duty of carrier and extending same after passenger left train. This is presented in various phases in the general discussion hereafter.

The **Fourth** likewise as the third. (Record, 319.) Adequate accommodations after leaving, etc.

The **Fifth** likewise. (Record, 319.) Ordering Bigger off train. No evidence.

The **Sixth** likewise. (Record, 320.) Duty did not cease by stopping train at Longview, etc.

## FOURTH POINT OF LAW.

We submit the **Seventh Assignment** as a proposition of law as error in giving the Special Charge without qualification, asked

by Plaintiff and given by the Court, which required Defendant "to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances, and the failure to exercise such degree of care would be negligence," because by this charge the jury was left to infer that Bigger was a T. & P. passenger after he had left the train without limitation, for the Court in its general charge (Charge, Record, pp. 77-204-320), instructed the jury, the duty did not end by stopping the train at Longview Junction. It was its duty to provide adequate and safe accommodations for passengers where they could alight to change cars and where they could be protected from the "inclemency of the weather," etc.

The record did not justify the Court in giving said Special Charge No. 1, as follows:

> "The Defendant, Texas & Pacific Ry. Co. owed to its passengers the duty to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances and the failure to exercise such degree of care would be negligence." (Record, p. 86.)

The error in this charge consisted in imposing a high degree of care after Bigger had left the train and was therefore in a position to use care in taking care of himself.

## POINT OF FACT.

### STATEMENT.

The undisputed evidence showed that Bigger while on the train was not injured and the claimed injury, if any, resulted from the alleged sudden and unprecedented rain that fell upon him after he had left the train at the depot. It became necessary for him to change cars at Longview to enter upon the train of

the International & Great Northern Ry. Co., the connecting point between the Texas & Pacific and the I. & G. N. Ry Companies.

The charge of the Court is set out in **haec verba,** see Rec. pp. 46-273.

## PROPOSITION THEREUNDER.

The law requires the **highest** degree of care only while the passenger is on the train; after the passenger has left the train and the passenger is no longer under the control of the train men though he may still be a passenger until he leaves the depot, the degree of care is modified since the passenger is no longer in charge of the train crew, and the railway then only owes him the degree of ordinary care, and therefore, the Court erred in giving the charge set out in Assignment of Error No. 7 (Record, p. 273), without qualification, to-wit: "The Defendant, Texas & Pacific Railway Company, owed to its passengers the duty to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances and the failure to exercise such degree of care would be negligence." Defendant asked proper qualifying charges that were refused.

## AUTHORITIES.

T. & P. Ry. Co. vs. Dick, 63 S. W. 895;

Townes (Texas) on Torts, 90.

## STATEMENT AND REMARKS.

It is undisputed that while Bigger was on the train he did

not make, nor has ever made, any complaint as to his care and attention thereon.

It is only because he got wet at the depot of the I. & G. N. or T. & P. Ry.—he was a passenger on both trains.

Counsel cited below on page 27 of their brief some cases cited by us in our brief. We especially call attention to the Court's charge there copied from M. K. & T. Ry. vs. White, to the effect: **"While the Plaintiff was a passenger on the Defendant's train"** it owed that high degree of care, etc. Not afterwards. (The black face are ours.)

Counsel did not cite nor have we found any case to justify the charge of a **high** degree of care after the real position of carrier and passenger in fact ceased on the train and when by legal fiction he was held to be a passenger after he had safely alighted at his destination and train had departed.

The case cited by counsel of G. C. & S. F. Ry. Co. vs. Shelton, 69 S. W. 653, does not support their contention. On page 658, the Court expressly says:

> "It may be that the conductor was not required to personally inform Plaintiff of the change of trains or cars, or which went through or beyond that station; but it is clear that if by his words or conduct, he misleads or misinforms or deceives a passenger upon this subject, he is guilty of a breach of duty for which his principal might be held responsible."

The same question as here was really not in that case. However, the Supreme Court granted a writ of error and affirmed it on another point. See 100 Tex. Sup. Rep. 301.

In the case of Tex. & Pac. Ry. vs. Dick, 63 S. W. 897, part of the charge of the Court applicable here was:

"If you believe the relationship of carrier and passenger had ceased to exist between the Plaintiff and Defendant when said assault was made, then you will find for the Defendant; and in this connection you are **charged that the relation of passenger ceased to exist after the Defendant alighted from the train** (black face ours), and after a reasonable time therefrom to enable him to depart from the premises of the Defendant."

We have never contended that a passenger leaving the train in not such for a reasonable time thereafter. Every such case must depend upon the particular facts and circumstances. We do not deny that it is the duty, while he is such passenger after train has departed, to use ordinary care to protect him just as it is the duty of the passenger to use ordinary care for his own protection and own safety, but if such injury results from his own want of care, which is the proximate cause of the injury, he cannot recover.

## PROPOSITION.

The law requires the **highest** degree of care only while the passenger is on the train; after the passenger has left the train and the passenger is no longer under the control of the train men though he may still be a passenger until he leaves the depot, the degree of care is modified since the passenger is no longer in charge of the train crew, and the railway then only owes him the degree of ordinary care, and, therefore, the Court erred in giving the charge set out in Assignment of Error No. 7 (Record, p. 309), without qualification, to-wit: "The Defendant, Texas & Pacific Railway Company, owed to its passengers the duty to exercise that high degree of care that would be exercised by very prudent persons under the same or similar circumstances and the failure to exercise such degree of care would be negligence." Defendant asked proper qualifying charges that were refused.

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Townes (Texas) on Torts, 90.

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> "If you believe the relationship of carrier and passenger had ceased to exist between the Plaintiff and the Defendant when said assault was made, then you will find for the Defendant; and in this conection you are **charged that the relation of passenger ceased to exist after the Defendant alighted from the train** (black face ours) and after a reasonable time therefrom to enable him to depart from the premises of the Defendant."

We have never contended that a passenger leaving the train is not such for a reasonable time thereafter. Every such case must depend upon the particular facts and circumstances. We do not deny that it is the duty, while he is such passenger after train has departed, to use ordinary care to protect him just as it is the duty of the passenger to use ordinary care for his own protection and own safety, but if such injury results from his own want of care, which is the proximate cause of the injury, he cannot recover.

In other words this Special Charge requires of the Defendant to use the same degree of care for a passenger at the transferring depot (which only requires ordinary care), the same as when on the train in the care of the train crew, as there was no train crew to go with him and carry an umbrella over him to protect him from the elements, the hot sun or rain, as when

being transported on the train. If the depot and grounds belonged to the T. & P. Ry. Co. (which was not in proof) and was not in its charge, possession or keeping (and it was not so shown), and it was required to build sheds across the track, which the Texas law does not require, the road would only be required to exercise care in providing a safe place to alight and walk upon and such was provided, as the testimony and photographs show. There were sufficient buildings at the depot. In the two propositions the one **on the train requires the highest** degree of care because for the time being he is in the hands of the train men and the other **merely ordinary care**—there is a marked difference required in the want of care. In the first the **very highest**, and in the other **ordinary care**, for he is supposed to help take care of himself.

In the first, the passenger submits himself to the train crew to safely transport him; in the other the company has to use ordinary care in preparing for certain emergencies, certain accommodations, at least on the presumption, when the journey is terminated the passenger having safely left the train, will use ordinary care in taking care of himself at the depot, while probably a **quasi passenger**, he is not under the **immediate** care of the train crew, upon whom the passenger relied for safe carriage, but not the province of the train crew to protect him from sudden rain, the act of God.

Whether the depot grounds and passenger station belonged to any of the other Defendants, and which one, rather than to the I. & G. N. is not in the record—so also is it not in the record that it belonged to this Defendant, and there was no issue of fact made as to the duty of any of the carriers in the case to provide on these grounds a shed from T. & P. tracks. The I. & G. N. was dismissed from the suit without objection of Defendant in Error, but in point of fact at their instance. Please examine the photographs of the property filed with the record,

which shows the location of the two roads, and the property thereon. In the entire discussion of this case, we shall feel it to be very helpful to have the photographs before the Court for reference. There was no issue made that depot building or ground belonged to any one or all of the Defendants. The petition alleged partnership and joint liability against all the Defendants but the point was abandoned and no proof offered, and the two alleged partners eliminated to cast the entire burden on this Defendant.

## FIFTH POINT OF LAW.

It is a question of fact whether an ordinarily prudent person who was sick with consumption would have gotten off the train in the rain and then, after getting wet, would have continued the journey in such condition, if there were other means at hand, which, if taken, would have saved the said Bigger from the effects of his exposure.

## FACTS.

The evidence on this point was that the deceased Bigger rode on that train until he got in at Little Rock without changing; he had opportunity to change into an I. & G. N. car or to a Pullman car, but instead of doing that, got off the train at Longview in the rain. He did not get wet while on the train, but the injury, if any resulted to him, resulted to him after he had left the train. The point is raised in Assignment of Error No. 8, Record, p. 320; Assignment of Error No. 13, Rec., p. 321; Assignment of Error No. 14, Record, p. 321; Assignment of Error No. 15, Rec., p. 321; Assignment of Error No. 16, Rec., 321; Assignment of Error No. 18, Rec., p. 322, and Assignment of Error No. 32, Rec., p. 326.

He got off the train in the very town of Longview, where there were hotels and boarding houses in close proximity. There were Pullman cars attached to the very train he was riding upon.

## SIXTH POINT OF LAW.

It is not the duty of trainmen to give personal notice to passengers, nor to awaken sleeping passengers to inform them to change cars or to leave trains, it is only sufficient to make the ordinary announcement, and passengers themselves are required to use ordinary care to ascertain the facts for themselves, and a failure to do which is such negligence as prevents a recovery, and whether such ordinary care was used to ascertain all the facts by the passenger, which could have prevented the injury, and whether such failure to use ordinary care, was the proximate cause of the injury, is a question of fact under proper instruction for the jury.

## FACTS.

The proof on the trial was that the trainmen announced from time to time that there was a passenger coach attacked for I. & G. N. passengers into which they would transfer to points on the I. & G. N. line. This point is raised under Assignment of Error No. 26, Rec., p. 323. See also Bill of Exception No. 25, Rec., p. 251, in which the Court refused to give the following special charge requested by Defendant, to-wit:

> "If you believe from the evidence that as the train approached Longview Junction its employees passed through the coach thereof in which J. T. Bigger was a passenger and announced that all passengers for I. & G. N. points should transfer to another car on said train, and if you further believe that said Bigger had he exercised that degree

of care that an ordinarily prudent person under similiar circumstances would have exercised, would have heard such announcement and that said Bigger was destined to San Antonio, your verdict shall be for Defendant."

## SEVENTH POINT OF LAW.

While not disputed as a general proposition of law that the relation of carrier and passenger continues for a reasonable time after leaving the train at the depot, the same degree of care is not required to protect the passenger—while the carrier is required then to the use of ordinary care to protect him, still the passenger is likewise required to the use of ordinary care on his part for his own safety and to do those things which an ordinary prudent person would do under like circumstances to protect himself.

## FACTS.

The undisputed proof showed that Mr. Bigger was transported safely and without any harm or injury from Little Rock, Arkansas, to Longview Junction, and that the train stopped and he was among the last to leave the train. He got off the train in the usual way, being asisted by the porter who put his box down, and conducted by the conductor to the nearest shed, part of the buidings belonging to one of the railroads, where he remained until the I. & G. N. car was ready to move out. Defendant requested the Court to charge, as set out in Bill of Exception No. 9, Record, page 220, as follows:

"Defendant requests the Court to charge the jury that under the law Defendant Railway is charged with the duty of transporting its passengers with a high degree of care while on its train and to stop its train for a sufficient

length of time for its passengers to safely alight at a regular station or at the end of their journey. If therefore you find that Defendant was guilty of no negligence in transporting J. T. Bigger safely to Longview Junction and the train stopped at its usual place for the station and he was given ample time in which to leave said train, then in such case Defendant would have discharged its duty to the Plaintiff and you will find for the Defendant."

The Court refused this charge. See Sixth Assignment of Error and Tenth Assignment of Error, Rec., p. 320.

## EIGHTH POINT OF LAW.

The Texas & Pacific Railway Company only owed to the deceased Bigger, a high degre of care while he was actually a passenger on the train which the undisputed evidence shows it performed, and thereafter if it owed any other duty at Longview, after he left the train, it was only the duty of ordinary care.

## FACTS.

Said Bigger was safely transported as a passenger on the train to Longview and after he left the train he got wet. See Tenth and Eleventh Assignments of Error, Rec., p. 320. See Special Charge No. 5, set out in Bill of Exception No. 10, Rec., p. 331; said charge being to the effect:

"Defendant discharged its legal duty by safely transporting J. T. Bigger as a passenger at Longview and is no wise responsible for the result of any injuries that may have been received from the elements that caused him to get wet after leaving its train of cars at Longview, for when he there left said train Defendant owed no further duty to protect him from an unusual rain storm as he had then

ceased to be a passenger on Defendant's train, having reached the point of destination as a passenger on said road."

Also in same connection see Special Charge No. 6, set out in Bill of Exception No. 11, Rec., p. 225.

## AUTHORITIES.

Under the foregoing several points of law, see the same as cited under Third Point of Law. Davis vs. Ry., 59 S. W. 846; Ry. vs. Finley, 79 Tex. 88; Ry. vs. Cole, 66 Tex. 563; Ry. vs. Hagan, 93 S. W. 1017; Ry. vs. Messeldine, 157 S. W. 247; Ry. vs. Guess, 154 S. W. 1061-2; White on Personal Injuries, Vol. 2, Secs. 19-20, pages 994-5; Ry. vs. Bingham, 90 Tex. 227; Street on Personal Injuries, Secs. 358, 394, 396.

## NINTH POINT OF LAW.

The law only requires railroad companies in Texas to provide and maintain adequate, comfortable and clean depots and depot buildings at their several stations for the accommodation of passengers, and to keep said depot buildings well lighted and warm for the comfort and accommodation of the traveling public, and not required to provide "accommodation," which in the meaning of the Trial Court's charge was to be sheds where "they could alight to change cars and where they could be protected from the inclemency of the weather" in contradistinction of their aforesaid statutory duty.

## STATEMENT.

It was therefore error to charge the jury as the Court did, to-wit:

"You are instructed that, as a common carrier, the duty of the Defendant to passengers on its train did not end by merely stopping the train at Longview Junction. It was its duty to provide adequate and safe accommodations for passengers where they could alight to change cars and where they could be protected from the inclemency of the weather. If they provided such safe and adequate accommodations and such as to protect the passengers from the inclemency of the weather, then the Defendant had fulfulled its duty under the law; and for any injury to the deceased resulting from getting off the train at the point mentioned, no recovery could be had. If, however, the Defendant did not provide for its passengers such accommodations as just described; and further, if the employees of the Defendant required the deceased to get off the train in a severe rain, and his illness and death resulted therefrom, without any fault or negligence on his part,, the Plaintiffs would be entitled to recover." (Rec., p. 77.)

## FACTS.

In addition to the testimony of witnesses as to the condition of the depot, depot grounds and shed, see the photographs. The testimony of the witnesses, especially Conductor Adkins (Rec., p. 152-153), showed the buildings and sheds were suitable and complied with the law.

## AUTHORITIES.

Article 6693 of the Revised Civil Statutes, 1911, of Texas, concerning depots, provides as follows:

'Duty to provide suitable freight and passenger depots.—It shall be the duty of all railroad companies in this State to provide and maintain adequate, comfortable and clean depots and depot buildings at their several stations for the

accommodation of passengers, and to keep said depot buildings well lighted and warmed for the comfort and accommodation of the traveling public; provided further, that said railroad companies shall keep and maintain separate apartments in such depot buildings for the use of white passengers and negro passengers, and to keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freights handled by such roads. (Acts 1909, 2 S. S., p. 401, Sec. 1.)"

There is no other statutory or legal obligation imposed by law.

## PROPOSITION.

Railroads are not required to build sheds at their depots to protect passengers from sudden or unusual rain or protect them from getting wet—only required to provide suitable freight and passenger depots—"provide and maintain adequate, comfortable and clean depot buildings at their several stations for the accommodation of the passengers; well lighted and warmed for the comfort and accommodation of the traveling public." (See Tex. Rev. Civ. Stat., Art. 6693.) But not required, as the Court charged the jury (see Fourth Assignment, Rec., p. 319) to "provide adequate accommodations for passengers where they could alight to change cars where they could be protected from the inclemency of the weather."

## AUTHORITIES.

Rev. Civ. Stat. Tex., Art. 6693, hereinbefore set out at length;

St. Louis & S. F. Ry. Co. vs. Grider, 161 S. W. Rep. 1032;

Stamps vs. Eastern Ry. Co. of New Mexico, 161 S. W. R. 450

## REMARKS.

We do not think there can be found any case that requires railroads to build over its tracks and yards and depot grounds sheds for passengers to enter, at least in small towns where travel is light. Such provisions are controlled by Railroad Commission regulation and there was none here. It would not only be an onerous burden to so require, but would be putting railroads to an unnecessary expense, for in many places outside cities such requirement would not only prove costly but wholly unnecessary and impracticable.

## TENTH POINT OF LAW.

The duty imposed by the Court's charge on the railway, was discharged to the said Bigger, as a passenger to "provide adequate, safe and comfortable accommodations and such as to protect the passengers from the inclemency of the weather." It provided for such accommodation by a through car of the I. & G. N. Ry. Co. which it transported over all its connecting lines for passengers of the I. & G. N. bound for points over said line, and Bigger owed some duty and care to ascertain such fact for himself.

## FACTS.

The undisputed evidence was that the T. & P. Ry. Co. carried an I. & G. N. chair car and sleepers on the same train with Bigger, which were transferred at the same time Bigger was to the I. & G. N. Ry. Co.

## AUTHORITIES.

Same as above;

White on Personal Injuries, Vol. 2, pp. 586, 1075;

Ry. vs. Guess, 154 S. W. 1061-62;

Am. & Eng. Ency. of Law, Vol. 5, pp. 558-9-60-61;

Ry. vs. Welsh, 86 Tex. 204;

Duty of Passenger to inform himself, Am. & Eng. Ency. of Law, Vol. 5, p. 57.

## ELEVENTH POINT OF LAW.

The undisputed and uncontradicted facts showing, as the record does, when Bigger entered the train the I. & G. N. car plainly marked was attached and further, that the train crew repeately made announcements in the several coaches for I. & G. N. passengers to transfer to the attached I. & G. N. car time and time again, at and before it reached Longview, to which point he was transported with the high degree of care as was the duty of the railway, making proper announcement. It was immaterial whether Bigger heard it, or not, for he owed a corresponding duty of ordinary care to watch, keep awake and listen for train signals and other means of safety for his own protection, to properly transfer, and it was likewise further error of the Court by its charge to limit the jury to the injury as to whether or not Bigger was notified, or heard notification made by the trainmen in announcing to passengers generally, rather than to the issue as to whether the announcement was made, which by ordinary care he would have heard.

## STATEMENT.

Rec., pp. 117, 118, 130, 131, 153, 137, 140, 141, 143, 151, 153. Among other things Bigger himself testified as follows:

"I was a passenger on the Texas & Pacific Railway on the date mentioned; and I had a ticket which entittled me to ride as a passenger on said train. I purchased said ticket in San Antonio, Texas, from the International & Great Northern Railway Company. Said ticket entitled me to ride as a passenger over the International & Great Northern Railway, the Texas & Pacific Railway, the Iron Mountain Railway and the I. & G. N. Railway; and permitted me to ride as a passenger from San Antonio, Texas, to Nashville, Tennessee, and return. I do not recall the exact date upon which I purchased said ticket, but to the best of my recollection it was about the 20th or the 21st day of June, 1912. Said ticket was a round trip ticket and entitled me to transportation from San Antonio, Texas, to Nashville, Tennessee, and return. I was a passenger on the Defendant Texas & Pacific Railway Company's train on or about the 10th day of August, 1912, by authority of said round trip ticket. The train upon which I was riding arrived at the station in Longview, Texas, some time during the forenoon of August 10th, 1912, to the best of my recollection. The train was late when it arrived there. When the train arrived at the station in Longview, either the conductor or the auditor, who was in charge of the train, ordered me to leave the train. It was raining in torrents. I told this party that I did not want to get off in the rain and he stated that I would have to get off because they could not hold the train there on account of the rain. The employe in charge of the Texas & Pacific train upon which I was a passenger on said date saw the ticket upon which I was riding. I do not know where said ticket is now. The ticket was taken up by the conductors of the trains on which I rode. At Longview Junction on the date mentioned the ground was very wet where I got off. There must have been an inch or two of water where I had to get off. The rain was falling in sheets. I got off in the rain and took my two grips and had to walk about one-third the distance of a block before I got to a shelter. I stepped in a place used as a railroad office. I got thoroughly soaked by the rain. The rain was falling in torrents at the time I got off. I could scarcely see the depot which was about a block away. I got thoroughly soaked. There did not seem to be a dry

thread on me; and my shoes were full of water. I was required to remain in the rain a sufficient length of time to walk the distance from the train to the shelter above referred to, which was about one-third of a block. With my grips I got along very slowly. I was also compelled to get in the rain again when I got on the I. & G. N. train after leaving the Texas & Pacific train. There was a coach in the Texas & Pacific train upon which I rode into Longview that came through to San Antonio on the line of the International & Great Northern. I know this because I saw the coach and saw people in it after leaving Longview who were not wet. They just remained in this coach and did not get off. I asked the conductor on the International & Great Northern Railway Company's train, after leaving Longview, about the through coach and he stated that there was a coach in the train we were then on that was brought into Longview on the train I came in on. He stated that the coach came all the way through from St. Louis. I had to wear my wet clothes from the time I got wet until about 11:30 o'clock that night when we arrived in San Antonio. Having to wear wet clothes, and from being in the rain and being exposed, caused me to take a deep cold from which I have never recovered. About a week after that I had to go to bed and have been in bed practically ever since." (Record, pp. 101-102-103.)

The Court by its charge submitted the issue as follows:

"You will observe right at this point that there was a sharp conflict in the testimony—the Defendant contending that such notification was given to the passengers in the Texas & Pacific coach, and the Plaintiffs contending that the deceased had no such notice. This question of fact, like all other questions of fact in the case, you will determine from a consideration of all the facts and circumstances in evidence." (Record, p. 78.)

## REMARKS.

The evidence from the trainmen is undisputed that the an-

nouncement was made as shown by the Court's charge—no issue submitted on that issue—only as to whether Bigger heard it—or had actual notice. Bigger no where stated the announcement was not made. He did not contradict the trainmen. He had traveled the route before. The recovery thus made to depend upon whether Bigger heard it and not as to whether as a prudent man he should have heard it, or listened for it, whether in fact made to him, or whether it was made in the usual and ordinary way.

## AUTHORITIES.

See foregoing.

See under 15.

Am. & Eng. Ency. of Law, Vol. 5, p. 571, and cases cited.

## TWELFTH POINT OF LAW.

If Bigger at time he started trip and had consumption at the time he was exposed and got wet, knowing such fact, it was his negligence in continuing the journey in his wet clothing for, first it was his duty to take care of himself and get dry clothing, even though he was required to stop off at Longview, or second to have entered the sleeper and gone to bed until his clothes dried and remained in the sleeper, if necessary, the entire night.

## FACTS.

Bigger was a sick man at time he entered train and knew it. (Rec., pp. 103, 105, 107, 109.) Mrs. Powers testified it was raining like a "cloudburst." (Record, p. 113.) Had tuberculosis. (Record, pp. 157-161-162.)

## AUTHORITIES.

See foregoing and above cited under other Points of law;

Ry. vs. Halloren, 53 Tex. 54-56;

Ry. vs. Miller, 79 Tex. 78;

Ry. vs. Cole, 66 Tex. 563;

Ry. vs. Hagan, 93 S. W. 1017;

Ry. vs. Guess, 154 S. W. 1061-2;

Am. & Eng. Ency. of Law, Vol. 5, p. 571.

Cannot recover if his own negligence contributed to his injuries:

Ry. vs. Stewart, 146 S. W. 355;

Ry. vs. Freles, 166 S. W. 194.

## THIRTEENTH POINT OF LAW.

The said Bigger having been an invalid and affected with consumption at and before he got wet, had no business or employment, the verdict in this case was excessive and based upon no sufficient evidence of expectancy.

## STATEMENT.

Bigger had no business or occupation. He was an invalid—came to San Antonio for his health and was doing nothing when he got wet.

## AUTHORITIES.

Street on Personal Injuries, Sec. 394.

## FOURTEENTH POINT OF LAW.

When Bigger reached Longview his passage over the Texas & Pacific Railway Company had terminated, it was within the right of the employees of said Company to so advise him, and it was manifest error in the Court to submit to the jury the issue that the Defendant "required the deceased to get off the train in a severe rain, and his illness and death resulted therefrom, without any fault or negligence on his part," when the journey had terminated and there was no evidence of force or persuasion used to **require him to get off in the rain.**

## STATEMENT.

See charge of the Court, Record, page 77, as follows:

> "If, however, the Defendant did not provide for its passengers such accommodations as just described, and further, if the employees of the Defendant required the deceased to get off the train in a severe rain, and his illness and death resulted therefrom, without any fault or negligence on his part, the Plaintiffs would be entitled to recover."

Bigger got off train at Longview voluntarily. He got off in the rain to transfer to the I. & G. N. Ry. Co.'s train, having failed while on the T. & P. train to transfer to a sleeper that went over the I. & G. N. lines or to an I. & G. N. car the T. & P. train carried for that purpose.

## AUTHORITIES.

Authorities cited.

STATEMENT.

It will be seen this charge is contrary to the evidence in several notable particulars:

First. It was undisputed the place he got off was a level paved place. See photographs. No evidence to the contrary.

Second. He was not required to get off in the rain.

Third. The railroad was not required to provide umbrellas, rain coats, busses, or shed, and no law requires it to do so at its depots.

FIFTEENTH POINT OF LAW.

Bigger having died during the pendency of the suit the cause of action abated and could only be revived by a bill of review, and would when allowed by the Court proceed as such, and as an original suit but not otherwise.

STATEMENT.

See First Amended Petition. (Record, p. 30.)

AUTHORITIES.

None necessary to cite.

SIXTEENTH POINT OF LAW.

The Court having erroneously submitted the issue to the jury

as to whether or not Defendant notified the deceased to transfer to the I. & G. N. car, before reaching Longview, the Defendant claiming to have made the announcement in the coach in which deceased was riding, which he as an ordinary prudent person should have heard, and further instructing the jury (Record, p. 78), there was a sharp conflict, when there was none, on the question of announcement for the jury to reconcile; it was error in the Court not to have given Special Charge No. 18, to the effect that witnesses who swore in the case because employed by the railroad company could not in the absence of anything to discredit or contradict such evidence be arbitrarily disregarded.

## STATEMENT.

Bigger was not asked any question as to whether the announcement was made or not. (Rev., p. 101.)

Mrs. Powers said she did not hear any. (Rec., pp. 112-115.) She made no inquiries about the I. & G. N. coach. (Rec., p. 116.) She "did not hear the brakeman or porter or anybody else tell the passengers to change. I do not know that I was listening to find out these things. * * * I knew we had arrived at Longview when this auditor or brakeman came through. He said 'this is Longview Junction.' I did not know that Longview Junction was the place to change cars—I did not expect to change cars at all, when I bought my ticket. I was told that I could go through without change."

Defendant's witnesses stated positively the announcement was made. (See Rec., pp. 98-99-100-130-136-142-151.)

The Court thereupon instructed the jury as follows:

"You will observe right at this point that there was a

sharp conflict in the testimony—the Defendant contending that such notification was given to the passengers in the Texas & Pacific coach, and the Plaintiffs contending that the deceased had no such notice. This question of fact, like all other questions of fact in the case, you will determine from a consideration of all the facts and circumstances in evidence." (Rec., p. 78.)

The Defendant thereupon requested the Court to charge the jury as follows:

"Defendant requests the Court to charge the jury that the evidence of all persons and witnesses who swore in this case, in the employment of the Railroad Company in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. That the jury should regard the testimony of every witness sworn of Defendant, but it is their duty to give to the evidence of witnesses the weight to which, in their opinion, as conscientious men seeking the truth, they believe it is entitled to and that the employment and business of a witness affords no reason why such evidence should arbitrarily, or without reason, be disregarded. (Rec., pp. 237-238.) (Bill of Exception No. 18.)

## AUTHORITIES.

Authorities cited.

In Brunswick & W. R. Co. vs. Wiggins, 113 G. 842 (L. R. A., Vol. 61, p. 113 and notes) the Court says:

"1. One of the grounds of alleged error is that the trial judge refused, on a proper request, to charge the jury that the evidence of persons in the employment of the Railroad Company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. Undoubtedly this is a sound proposition of law. The jury cannot arbitrarily disregard the evidence of any witness which is not contradicted by other evidence of cir-

cumstances. The jury should regard the testimony of every witness sworn. They are not obliged to believe it, but it is their duty to give to the evidence of witness the weight to which in their opinion, as conscientious men seeking the truth, they believe it is entitled; but the employment or business of a witness affords no reason why this evidence should arbitrarily or without reason be disregarded. Western & A. R. Co. vs. Beason, 112 Ga. 553, 37 S. E. 863; Georgia R. & Bkg. Co. vs. Wall, 80 Ga. 202, 7 S. E. 639 * * * but in any event, as a matter of law, the refusal to give the charge was error."

## SEVENTEENTH POINT OF LAW.

J. T. Bigger, Deceased, did not testify he heard no announcements made. That was studiously avoided, but he saw the car after leaving Longview, because he saw people on it who were not wet—such people evidently were prudent. He said:

"There was a coach in the Texas & Pacific train upon which I rode into Longview that came through to San Antonio on the line of the International & Great Northern. I know this because I saw the coach and saw people in it after leaving Longview who were not wet. They just remained in this coach and did not get off. I asked the conductor on the International & Great Northern Railway Company's train, after leaving Longview, about the through coach and he stated that there was a coach in the train we were then on that was brought into Longview on the train I came in on." (Record, pp. 102-103.)

Now the Court charged:

"If the employees and agents did, as Defendant contends, notify the deceased, as stated, then it was his duty to leave the Texas & Pacific coach and go to the International & Great Northern coach for the purpose of being transported to his destination, and if the deceased failed to act upon

such notification and go back to the International & Great Northern coach, then he so far contributed to his illness and death as would prevent a recovery on the part of Plaintiffs. You will observe right at this point that there was a sharp conflict in the testimony—the Defendant contending that such notification was given to the passengers in the Texas & Pacific coach, and the Plaintiffs contending that the deceased had no such notice. This question of fact, like all other questions of fact in the case, you will determine from a consideration of all the facts and circumstances in evidence."

Bigger did not make any request to have car backed or returned to transfer him. Each one of the Defendant's trainmen stated the announcement was made, as follows:

J. E. BARNETT, a brake man of the Texas & Pacific Ry. Co. (Record, p. 99):

"I remember the occasion in question and that I made the usual announcement."

MRS. ROSA L. POWERS, the star witness for Plaintiffs, who sued the Texas & Pacific Ry. Co. for getting wet at same time, said:

"They did not put me in the little shed or switch house; but I put myself there. I think that the shed or switch house was more than 8 fet from the I. & G. N. train on which I embarked, but I do not know how much further it was. It was further from the shed than the train I got off of, but I do not remember much about that. The man (porter) told me I would have to get off the train because I said I was going to San Antonio. He said the train I was on did not wait at Longview. He said: 'This train don't go to San Antonio; you will have to get off if you are going to San Antonio; this train don't go to San Antonio.' I did not claim that the porter ordered me off the train or that he was giving me anything else but informa-

tion. I have sued the I. & G. N. for the same cause of action as is involved in this suit. Mr. Bigger and I are the only two, of the four that got off at Longview, that have sued. (Record, p. 115.) * * * We did get the same attorneys however. (Record, p. 115.) * * * When I got to the train I made no inquiries and I did not hear Mr. Bigger make inquiries for the I. & G. N. coach. (Record, p. 116.) I heard no auouncement at all, made by anybody about changing cars at Texarkana. I did not hear the brakeman, or porter, or anybody else tell the passengers to change. I do not know that I was listening to find out those things; but I remember some colored porters coming in and sweeping out the cars. I do not remember the brakeman who is sitting at the point indicated by counsel. I do not remember his making any announcement. I heard no one make any annoucement in Texarkaa and all I saw there was the sweepers. I did not hear any announcement made at any station. I do not remember them calling out for Marshall. I remember the auditor on the train. He testified in my case. I did not hear the auditor announce at Marshall that people going on the I. & G. N. train could transfer at Marshall if they had not already done so at Texarkana. I do not remember hearing the auditor or the conductor or porter announcing for Longview before we got into Longview. I did not hear anyone call out for Longview. I knew we had arrived at Longview when this auditor or brakeman came through. He said 'This is Longview Junction.' I did not know that Longview Junction was the place to change cars. I did not expect to change cars at all. When I bought my ticket I was told that I could go through without change. (Record, p. 117.) * * * I knew after I was told, that if I intended to go to San Antonio I would have to get off that train. I never heard anybody announce that passengers should change cars to the I. & G. N. car attached to the rear. I do not remember seeing them make up the train at Texarkana. I did not see them cut any cars apart and put in a sleeper at Texarkana. I did not pay any attention to that and it may have accurred and I do not remember it. I remember this car (the car I was in) standing off to itself when the sweepers came. I started at St. Louis at 9 o'clock in the morning in full day, and I

rode all day in going from St. Louis to Texarkana, and I did not see an I. & G. N. coach or know there was one on the train. I did not go out of the coach the whole day. I had my lunch with me; and I never left the coach during the night or day from the time I left St. Louis until we arrived at Longview; I paid some attention to some announcements made before we arived at Longview. I remember anouncements at Popular Bluffs, Missouri, and at De Soto and Bismark. I never heard any announcements at Texarkana; but I remember them at Poplar Bluffs and other places before getting to Texarkana, as it was daylight; but I remember what happened at Texarkana." (Record, pp. 118-119.)

W. P. DEHNE, brakeman, place on I. & G. N. car and said:

"I made announcements only in my end of the train and I do not go up into the El Paso chair car or the Fort Worth and Dallas chair cars. I remain in the rear end from the I. & G. N. coach back, and make anouncement for passengers to get off at Longview Junction and Longview City myself. The I. & G. N. coach comes from St. Louis. It is a regular coach or chair car. We had only one I. & G. N. coach on the occasion mentioned and that came from St. Louis. At Texarkana there was a sleeper put in between the chair car and the coach." (Record, pp. 130-131.)

H. I. BODECKER at the time of alleged injury was train auditor. He said:

"I am positive I made the announcement between Marshall and Longview Junction and closer to Longview than to Marshall. I made that announcement all through the car. I am positive of that because of the rain at that time. I could not be mistaken about it. The porter was with me and made the anouncement right behind me." (Record, p. 137.)

"It was an easy matter for the passengers to transfer by going through the Pullman cars at any time from Texar-

kana to Longview or even before reaching Texarkana as it was to get off at Longview and transfer, as the I. & G. N. car was attached right behind the Texas & Pacific car up to the time it reached Texarkana, and I gave them ample opportunity to do so. I stood on the paltform and assisted some passengers who left the Texas & Pacific car upon my invitation. That occurred between Marshall and Longview Junction. So there was a transfer of some passengers that I knew of." (Record, p. 140.)

PETER WYATT, testified he was porter on I. & G. N. train. He further said:

"I made some announcements to passengers in the Texas & Pacific car who were destined to San Antonio and other I. & G. N. points. I made the announcement after leaving Marshall, at Lansing, about 6 miles before reaching Longview. The usual place for such announcement is anywhere between Marshall and Longview, and when I get to Longview I call it again. Whenever we have the I. & G. N. connection I work the Texas & Pacific chair car until we get to the connection. I worked in the Texas & Pacific car on this occasion. After leaving Marshall, I was instructed by the conductor to go back in the Fort Worth chair car and see if there were any passengers for I. & G. N. points and I always do that. Before reaching Longview I always go back and say, 'Longview Junction will be the next station. All passengers for I. & G. N. points will go back through the sleeper to the I. & G. N. coach, change for Houston, Galveston, San Antonio, Austin and Laredo, and don't forget your baggage,' and I assists several ladies and several gentlemen with their bags and grips from the Fort Worth chair car, and the train auditor stands in the rear of the Fort Worth chair car and assisted the ladies in crossing; and I calls three times, 'Longview Junction, change for Houston, Galveston, Austin, San Antonio and Laredo, and don't forget your baggage.' I also called again 'Longview Junction, change for Houston, Galveston, Austin, San Antonio and Laredo, and don't forget your baggage,' and when the train approaches Longview, I calls again, 'Longview Junction, change for Houston, Galveston, Austin, San An-

tonio and Laredo, and don't forget your baggage.'" (Record, pp. 142-143.)

"I am positive I notified the passengers to get off at Longview. The lady had plenty of oportunity to get off the train after it stopped at Longview before the switching occurred. Passengers often get on the Texas & Pacific car between Marshall and Longview and have plenty of time to get off at Longview. The train stops long enough for passengers destined for Longview to get off there before the switching occurs, either in the rear or in the front of the train. Mr. Bigger and the lady had plenty of time at Longview before the switching was done to have gotten off or have gone back into the I. & G. N. car." (Record, p. 149.)

R. H. ADKINS, the conductor, stated he instructed the porter to make the announcements and he made them. (Record, p. 150, et seq.)

P. F. CRUTCHFIELD, conductor for I. & G. N. Ry. Co. at the time, said:

"At the time the Texas & Pacific train arrived at Longview, it was just sprinkling a little bit though it had been raining awful hard, and it had rained what I should call 'the bottom dropping out.' When the Texas & Pacific train arrived it had been some 10 or 15 minutes since the hard rain. I remember that distinctly. My run is from Palestine to Longview Junction and from Palestine to Mineola. On the date in question I was running from Palestine to Longview. On the date in question there were three Pullman cars on the I. & G. N. for San Antonio and Laredo." (Record, p. 156.)

## REMARKS.

While there may have been some conflict in the testimony as

to personal notification, there is absolutely no conflict that the announcement was made in the car where Bigger was sitting and it is a little singular that having traveled over the same line before, he did not enter the I. & G. N. coach in the first instance at Little Rock. It was plainly marked. He had ample time even after the train reached Longview to transfer, and he did not, though others did, even shown by the star witness, Mrs. Powers, who also sued, that others transferred, whom she saw in the right coach. They were more prudent or careful at some time prior to entering the train. If Bigger saw it as he says he did at Longview, what was there to prevent him seeing it before that. It was there all right.

## EIGHTEENTH POINT OF LAW.

The Court should have instructed the jury as requested in Special Charge No. 10, Assignment No. 16, Record, 311, on the question of ordinary care required of Bigger, as a sick passenger and his failure to transfer and his failure to stop at Longview and otherwise take care of himself. Bigger's want of care in not informing himself of the attached car and failure to have it attached to transfer him was both negligence and a waiver.

## STATEMENT.

The testimony was undisputed that Bigger was a sick man and had consumption when he got wet. He knew the fact but the Railway did not. He could have ridden in a Pullman or stopped at the hotel at Longview and gotten dry clothing. Under these facts Defendant requested the following charge:

> "At the request of the Defendant, the Texas & Pacific Railway Company, I submit to you the following Special Charge:

"If you believe from the evidence that at the time J. T. Bigger, Deceased, boarded the train for pasasge to San Antonio, Texas, as allaged in the Petition, that he was suffering from lung trouble or consumption, and that he knew this fact, and if you further believe from the evidence that such fact was not brought to the knowledge of Defendants herein, or any of them, and if you further believe from the evidence that the said Bigger did not provide himself with a change of clothing and carry same along and that such failure was negligence on his part, and that an ordinary prudent person under similar circumstances would have secured same before continuing the trip, and if you further believe from the evidence that he, in changing cars at Longview Junction, Texas, became soaked with rain or water, as alleged in his Petition, and if you further believe from the evidence that an ordinary prudent person under similar circumstances would have ascertained before reaching Longview Junction, that a through San Antonio coach was in the train on which he was a passenger, or if you find from the evidence that an ordinary prudent person, under similiar circumstances, would have, after getting wet, taken care of himself by providing himself with a change of dry clothing, or by going to a hotel or some place of shelter and not proceeding on his journey, as he did; and if you further believe from the evidence that the getting wet in his then physical condition resulted in any way of the injuries alleged in their Petition, and that he would not have suffered such injuries except for having been in said physical condition at the time of so getting wet; or if you believe from the evidence that if he had had a dry change of clothing to have immediately put on, or that if he had gone to a hotel or some other place of shelter and not proceeded on the journey, he would have avoided suffering the injuries that it is claimed he suffered, then you are charged that Plaintiffs are not entitled to compensation for such injuries as against the Defendant herein and your verdict should be for the defendant."

AUTHORITIES.

See those cited;
Am. and Eng. Ency. of Law, Vol. 5, p. 576.

## NINETEENTH POINT OF LAW.

The train stopped at Longview long enough to transfer to the I. & G. N. car before it was switched. (Record, pp. 139-140-141-149.) Some of the people transferred at Longview. (Record, p. 141.)

P. F. Crutchfield testified: "At Longview there were hotels and stores in close proximity to the depot where Bigger, being a sick man, could have stopped and secured dry clothing, and protected himself." (Record, pp. 192-193.)

## REMARKS.

He was not compelled to come on to San Antonio in wet clothing for he knew he was a sick man and a consumptive, though it was a hot August day. He should have traveled in a sleeper. He should have transferred to a sleeper even though he might not know there was an I. & G. N. car atached. He knew there was a sleeper put on at Texarkana—that would have been the prudent thing for him to do, to have gotten thereon.

## TWENTIETH POINT OF LAW.

The undisputed evidence showing Bigger safely transported on the train of and over the line of the T. & P. Ry. Co. and what injury, if any, was received after he left the train at the depot to enter the I. & G. N. car and the suit predicated on a partnership between the Defendants, and no proof offered to show the ownership of the ground and whose duty, if any one, to build and maintain the depot and sheds, it was error to dismiss any of the parties and hold the T. & P. alone.

## STATEMENT.

See testimony under foregoing Statement of Facts.

## AUTHORITIES.

Act. 1905, cited above (if valid).

In support of the foregoing proposition of law and for the convenience of the Court, because they are not all cited, as we believe it to be quite as convenient as outlined by the assignments and law points presented, we quote from the following authorities:

Article 6693 of the Revised Civil Statutes, 1911, of Texas, concerning depots, provides as follows:

> "Duty to provide suitable freight and passenger depots: It shall be the duty of all railroad companies in this State to provide and maintain adequate, comfortable and clean depots and depot buildings at their several stations for the accommodation of passengers, and to keep said depot buildings well lighted and warmed for the comfort and accommodation of the traveling public; provided further, that said railroad companies shall keep and maintain separate apartments in such depot buildings for the use of white passengers and negro passengers, and to keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freights handled by such roads." (Acts 1909, 2 S. S., p. 401, Sec. 1.)

For its passengers for points on the I. & G. N. the T. & P. furnished through I. & G. N. coaches and Pulman cars to ride and transfer in, which Bigger should have gone in when he boarded the train or thereafter transferred to. This was a fact easily ascertainable by him, by either using his eyes or sense of hearing or could easily have ascertained by inquiry. Assuming he was

negligent in any or all of these things, which we insist if done by him would have avoided the heavy rains. This conclusion is unanswerable. Instead of placing the burden upon the carrier, as the Court did, it should have commended rather than extending its obligation to passengers so far after leaving train, and imposing all the burden by its charge upon the carrier for the deceased was under some duty of ordinary care after leaving train.

In Railway vs. Halloren, 53 Tex., p. 54-56, speaking on the subject of a claim dor damages arising and growing out of and caused by a heavy rain at Palestine, our Supreme Court says:

> "The test of liability is, not whether the company used such particular precaution as is evident after the accident happened might have averted it had the danger been known, but whether it used that degree of care and prudence which very cautious, competent persons would have used under the apparent circumstances of the case to prevent the accident, without reasonable knowledge that it was likely to have occurred. (Shear. & Red. on Neg., Sec. 266; Bowen v. N. Y. C. Railroad Co., 18 N. Y. 408.) * * * That it had rained during the day at Palestine, but not so hard as to make it necessary to give orders in reference to the track.
>
> "The evidence, as thus disclosed by the record, shows that the Defendant Company had used a commendable degree of skill, prudence, and vigilance in the construction and management of its road, and that the misfortune to the Plaintiff was the result of one of those inevitable accidents of which passengers assume the risk, and for which the law does not hold the company responsible in damages." (Angell on Carriers, Sec. 523.)

In Ry. vs. Butchers, 83 Tex. 316, approving above case, says:

> "We will add that, in our opinion, the charge of the Court was substantially correct, except that Defendant was

only bound to have its **platform,** etc., **reasonably** safe, and that there was no error in refusing to allow the second special instruction as requested by the Defendant. This charge would have instructed the jury that the Defendant was only bound to the exercise of ordinary care toward the Plaintiff's wife, who was one of its passengers. In regard to those things which the carrier is required to provide to secure the **safety** of the passengers, we understand that it is bound to use that high degree of care which a very prudent person would have used in his own business under the same circumstances. (Hutch. on Carr., Secs. 506-521.) The defendant was not bound to have its platform absolutely safe, but only reasonably so under the circumstances, yet in accomplishing this result it was bound to use more than ordinary care and precaution. (Railway v. Halloren, 53 Tex. 53; Railway v. Gorbett, 49 Texas 508.) For the error indicated, we conclude that the judgment should be reversed and the cause remanded."

In Houston & T. Central R. Co. vs. Batchler, 73 S. W. 981; 37 Tex. Civ. App. 116—Batcher got into an argument with the conductor in regard to the fare from Garrett to Ennis, and after a few words had been passed the Appellee cursed the conductor. Appellee was going to Ennis to make connections with another train and as he was leaving the train platform, the conductor struck him with a piece of iron, and a fight ensued.

Held: The relation of carrier and passenger continues not only until the passenger has left the car, but until he has left the station, or until a reasonable time has been given him to leave the premises, and during such time he is entitled to the protection of the carrier, without regard to the object of his journey or his reason for stopping at such station.

Where a passenger on a railroad train used grossly insulting language to the conductor, and he struck passenger, the jury should consider the conduct of such passenger in fixing his damages, and whether the assault was committed under the im-

mediate influence of passion engendered by the insulting words, or was the outcome of cool deliberation. Judgment for H. & T. C. R. Co.

In Texas & Pacific Ry. Co. vs. Miller, 79 Texas 78: Plaintiff Miller sues to recover damages for injury done to his wife, alleged to have been caused by the negligence of servants of receivers then in charge of Appellant's railway, whereby she was injured in alighting from a train.

Held: Judgment for Plaintiff Miller.

The rule imposing upon the carrier of passengers the highest degree of care applies only to the means and measures for safety which the passenger of necessity must trust wholly to the carrier. It is in general applicable only to the period during which the carrier is in a certain sense the bailee of the person of the passenger. The transit cannot be considered as ended until the passenger has left the car. The carrier's duty continues until the passenger has alighted from the car.

In Louisville & N. R. R. Co. vs. Keller, 47 S. W. 1073—Facts: Appellee, in company with other ladies and a little boy, bought tickets for passage over Appellant's road, at Louisville, to go to Shepherdsville. Upon reaching Shepherdsville she got off and it was raining and hailing very hard, and she was without an umbrella. Just before she got off a freight train pulled up between her and the station and she was compelled to stand out in the rain and hail. Some of the employees on the train laughed at her while she was standing there in the rain waiting for the freight train to pull out.

Held: As a passenger leaving a train at a station was entitled to an unobstructed way to the waiting room for shelter, she may recover damages for injuries from exposure to a rain-

storm by reason of the fact that the way was obstructed by a freight train. As Plaintiff was laughed at and tantalized by Defendant's servants on the train while exposed to the storm, an instruction authorizing primitive damages was proper.

Railroad Co. vs. Walsh, 78 Ill., App. 595: When a passenger alights from a car, it having stopped at a safe place for such purpose, the relation of the company to such passenger as a common carrier, and its duty incident to such relation, ceases.

Davis vs. Houston & T. C. R. Co., 59 S. W. 844: Plaintiff's wife and children purchased three tickets over Defendant's road and two other roads. Defendant, which owned the depot used by the last carrier and several others, delivered them at the depot, where they had to wait until morning for a train of the connecting carrier, of which they were informed. Several hours after their arrival they were placed on one of Defendant's trains by Defendant's depot master, who erroneously informed them that it was the one they were to take, which took them to another station, where they were obliged to spend the night.

Held: In an action to recover for discomfort, fright and exposure caused thereby, that an instruction that the contract of carriage by Defendant was complete when it had safely transported Plaintiff's wife and children to its depot, and it could not be held liable on its contract of carriage for any act occuring thereafter, was proper, since, after a reasonable time for departure from the depot, the relation of carrier and passenger had ceased.

In Nun vs. Georgia Rd., 51 Am. Rep. 287, it is held:

> "Se also the able and learned opinion of Hardy, C. J., in Southern Ry. Co. vs. Kendrick, 40 Miss. 374, which covers and effectually disposes of every question considered here. These cases proceed upon the reasonable ground that pas-

sengers are vigilant to perform their parts of the undertaking which they set out to accomplish, and which is only to be done by their own exertions. It results also from the difference of the obligations of carriers of goods and of passengers; in the latter, it is simply to carry and allow passengers sufficient time and oportunity to leave the vehicle. Hutch. Carr. 614; Thomp. Carr. Pass. 226, 227, and citations. As to duty of passengers to observe the known and obvious rules of the company in entering and leaving cars, 2 Redf. Am. Ry. Cas. 536, 540-542; 3 Am. and Eng. R. Cases, 340.

"How far a custom upon the part of conductors, known, or which may be presumed to be known to the company, to assist unattended females or children, or infirm persons, will modify these rules, we do not now decide, as there is nothing in this case falling within such a principle. This was a drowsy man, traveling a distance of ten miles; he made no contract with the company to have him aroused, in case he should be asleep when he reached his destination; he relied upon the courtesy of the conductor to do him this kind office, as it seems he had on previous occasions done for him, and perhaps for some others. These exceptional and occasional instances afforded no evidence of a custom binding upon the company. The Plaintiff failed to make out any case, and there was no error in sustaining the motion for a nonsuit. Judgment affirmed."

In Davis vs. H. & T. C. Ry. Co., 59 S. W. 846, it held as follows:

"The contract of carriage only required Appellee to transport Appellant's wife and children from Austin to Houston, and deliver them at its depot; and this contract was completed when they were so delivered, and a reasonable time allowed them to leave said depot. The contention that the relation of carrier and passenger existed between Appellee and Appellant's wife and children, while they remained at said depot, awaiting transportation over the Texas & New Orleans Railroad, cannot be sustained. The facts show that this depot was the depot of the Texas & New Orleans Rail-

road Company, where it received and discharged its passengers; that while waiting at said depot to take passage on a train on the Texas & New Orleans Railroad, with tickets entitling them to passage on said road, the Appellant's wife and children were passengers of said road, and the relation of passenger and carrier between them and Appellee had ceased." Harris v. Howe, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777; Rozwadosfsklie vs. Railway Co., 1 Tex. Civ. App. 487, 20 S. W. 872; Railway Co. v. Franklin (Tex. Civ. App.), 44 S. W. 702; Railway Co. vs. Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741.

"Appellant's second, third and fifth assignments attack the charge of the Court in applying the rule of ordinary care to the alleged act of Appellee's depot master in directing Appellant's wife to the wrong train. Our opinion being, as stated in our consideration of the first assignment, that the relation of carrier and passenger did not exist between Appellee and Appellant's wife at the time of the alleged negligent act, the Court correctly applied the rule of ordinary care in determining whether or not the act alleged was negligence."

In the case of St. L., A. & T. Ry. Co. vs. Finley, 79 Texas 88, it is held as follows:

"The refusal of each of these instructions is separately assigned as error. We have this day decided in the case of the Texas & Pacific Railway Company, v. Miller that the contract of a railroad company with a passenger does not terminate until he has alighted from the cars. We have nothing to add to the discussion of the question in that opinion.

"The first proposition therefore in the first charge requested made it proper for the Court to refuse the entire instruction. But since the contract was in force until the Plaintiff had alighted, the company owed her the duty of exercising the highest degree of care in enabling her to make the descent in safety. Whether or not the means provided to

enable her to do this was the exercise of due care was a question of fact for the jury. Railway v. Murphy, 46 Tex. 357. For a similar reason the second instruction requested by the Defendant was properly refused.

"We do not understand it to be a rule of law that a carrier owes to every passenger precisely the same care, without respect to age, sex, or bodily infirmity. The degree of care is the same—that is to say, the greatest care—but what would be sufficient to insure the safety of one person may not be sufficient for others physically less able to take care of themselves. It is a matter to be determined by a jury.

"Upon another trial the question to be determined will be: Did the company exercise the degree of care incumbent upon it in informing the Plaintiff that she had arrived at the place to alight and in providing means to enable her to do so in safety? And if not, would an ordinarily prudent person, under the same circumstances, have attempted to alight as she did?"

In the case of Texas & Pacific Ry. vs. Cole, 66 Texas 563, it is held:

"In the view we take of the case, it will not be necessary to consider the second question raised by the Appellant. That the walk from Wayne to Galloway station was the immediate cause of Mrs. Cole's injuries, is not doubted. Hence, her right to recover damages on this account depends upon whether or not it was an act of ordinary care on her part to attempt this walk under the circumstances. Whatever course ordinary care would dictate, we must presume the conductor supposed she would pursue, and for whatever injury resulting to her, notwithstanding she used such care, the Appellant is liable.

"Wayne must have been a station of some importance. A telegraph office was kept there, and both day and night trains stopped at the place. It was a small town with stores,

dwelling-houses and a boarding house, at which at least one person from a distance had been entertained. Had there been a hotel there, known to Mrs. Cole, her conduct in choosing to walk back to Galloway, in so intensely cold a night, instead of seeking lodgings at the hotel, would have been inexcusable. Any injury she thereby received would be charged to her own negligence. The same rule would hold good if there was a boarding house there which she knew had accommodated travelers, for she could but have concluded that she could be sheltered there, especially in view of her uncomfortable condition.

"There was no hotel at Wayne, and no boarding house known to Mrs. Cole. But this latter fact did not excuse the course she pursued, because she made no use of the means in her power to find whether or not there was a place at the station where she could find lodging for the night. If there was no such place, and the inquiry therefore would have been fruitless; or if there was no one of whom she could make the inquiry, there would have been some excuse for her conduct. But there was a house there at which she could probably have obtained lodgings, and the depot agent of whom she could have made the necessary inquiries, was there and in her presence, and yet she said nothing to him on the subject. She did not, therefore, use the means in her power of saving herself the uncomfortable walk back to Galloway. * * * Here her duty towards the company commenced. This was to use ordinary care to prevent injury to herself greater than the situation demanded. As the night was very cold and the ground frozen, ordinary care dictated that she should obtain lodgings at Wayne, if possible, and not risk a walk of two miles back to Galloway, attended, as it might be, with discomfort and danger to the health of herself and infant child. Yet she took no steps to find out if she could get quarters for the night at Wayne; but, on the assumption that she could not, undertook the uncomfortable journey, and she, and not the railroad company, must bear the consequences of her choice. * * * She was at a place where, upon inquiry, she would probably have found comfortable lodgings, at least she had no right to assume the contrary; yet she asked no questions as to whether she could

be thus accommodated. She chose to walk a long distance at night in severe weather to the place of her original destination, rather than seek comfortable quarters at the place where she left the train. We think the point is well taken that the injuries for which damages were sought and recovered below were proximately caused by her own negligence. The views expressed in this opinion will be found fully sustained by the following, among other authorities: Cooley on Torts, 674; Lewis v. Railway Company, 18 Am. & Eng. Ry. Caces 263, and authorities cited in opinion and notes; Railway Company v. Eaton, 1b. 254, and authorities.

"Because the verdict is against the evidence in the matter indicated, the judgment is reversed and the cause remanded."

In M. K. & T. Ry. Co. vs. Hagan, 93 S. W. 1017, it is held:

"The injured party is required to exercise ordinary care to arrest or lessen his injuries, and if he fails to do so and by reason of such failure his injuries are aggravated or increased, he is not entitled to recover such aggravated or increased injuries. Railway Co. v. Parks (Tex. Civ. App.), 90 S. W. 347. If the Plaintiff was injured as a result of negligence on the part of Defendant, then he was entitled to recover damages for the physical and mental pain suffered by him by reason of such injury."

In Railway vs. Missildine, 157 S. W. 247, the Court held:

"If it is the duty of common carriers to exercise a proper degree of care to provide safe means of ingress and egress to and from their trains at places where passengers are expected to get on and off, that duty cannot be evaded by negligently carrying a passenger beyond his destination and compelling him to get on or off the train at an unusual place in the dark rather than to furnish him the opportunity at the regular stopping place. S. A. & A. P. Ry. Co. v. Turney, 33 Tex. Civ. App. 626, 78 S. W. 256; Stewart v. Railway Co., 53 Tey. 289, 37 Am. Rep. 753; Railway Co. v. Thornberry (Sup.), 17 S. W. 523. That a passenger compelled to alight on a dark night at an unusual place and walk

the track to a depot might fall into a cattle guard over which he was compelled to pass should as readily be anticipated as that one alighting at the depot would be injured by a defect in the platform or premises at that place. The accident in this instance was one which not only might have been contemplated as possible, but one which should have been anticipated as likely to happen considering the darkness of the night and the surroundings of parties. The only other agency outside of the negligence of the Appellant in carrying the Appellee to a place where he would be compelled to pass over this cattle guard which could have supervened to cause the injury was his own contributory negligence in failing to evade the danger. The Court made Appellee's right to recover depend upon a finding that he was not guilty of such negligence. Hence we conclude that there was no error in the charge complained of, nor in refusing that requested."

In the case of G. C. & S. F. Ry. Co. vs. Guess, 154 S. W. 1061-62, it is held:

"Appellant assigns error upon the following charge of the Court: 'If you believe that the Plaintiff went upon said train and his said wife and family to assist them in going upon said train, with the knowledge of the Defendant's brakeman, but you further believe, that the Plaintiff in jumping or stepping off said train failed to use ordinary care in so doing, and that such failure, if failure there was, to use such ordinary care, caused or contributed to cause his injuries, if any he received, then you will find for the Defendant, although you may believe that the Defendant was guilty of negligence as alleged by the Plaintiff, and submitted to you in the former paragraph of this charge.' The criticism as to this charge is that it does not instruct the jury that Appellee would be guilty of contributory negligence is a reasonably prudent man would not have jumped off the train under the circumstances that he did, but only that Appellee was required to use ordinary care in jumping off the train. It matters not how much care he used in jumping from the train, if it was negligence in him to jump at all under the circumstances; and we think the charge is sub-

> ject to the criticism made by Appellant in this regard, especially as nowhere in the charge does the Court instruct the jury that the test was whether or not an ordinarily prudent man would have jumped off the train under the circumstances under which Appellant did so. Railway v. Highnote, 99 Tex. 23, 86 S. W. 923; Railway v. Leslie, 57 Tex. 83; Railway v. Wallace, 139 S. W. 1052."

Mr. White in his personal injuries on railroads, Vol. 2, page 1075, says:

> "When the train has been stopped for a reasonable time, it is no part of the duty of the employees of the railroad company to make a personal inspection, or to interrogate the passengers remaining on the train, to see if any should have alighted. The law imposes no such duty upon the passenger carrier and if it appears that other passengers, similarly situated, as to age, sex and physical condition, had ample time to alight from the train, this would furnish sufficient evidence that injured passenger could also have safely alighted, if he had used reasonable expedition to get off the train. Hurt v. St. Louis, etc. R. Co., 94 Mo. 255; 7 S. W. Rep. 1; 34 Am. & Eng. R. Cas. 422."

In the case of Gulf C. & S. F. Ry. vs. Guess, 154 S. W. 1061-62, supra, we think clearly establishes the doctrine that an ordinarily prudent person who was sick with consumption, after having gotten off the train in the rain and getting wet would not have continued the journey in wet clothes in a chair car, such person would either stop at a hotel in Longview or have gone into the sleeper and had a bed made down if he had no dry clothing and had the porter hang his clothes out to dry in the gentlemen's room, which would have been very quickly done on a hot day in August. In fact, such a man, sick with consumption should have taken a sleeper to begin with and certainly in order to transfer at Longview if he did not know there was an I. & G. N. car attached. He was very negligent, for passenger carriers are not held answerable for sick persons for any greater care than for other persons.

"Passenger carriers are not held answerable to sick persons for any greater degree of care than other passengers, but the increased risks of a journey, in so far as they arise from the passenger's condition of health, and fitness for journey, must be assumed by the passenger." White on P. I. on R. R., Vol. 2, page 586.

"The R. R. Co. owes no duty to awake sleeping passengers to disembark. Its duties are essentially different from those of sleeping car company or in keepers. It is the duty of the passengers to keep awake, so that they will have sufficient time to alight." Id., p. 705. Munn vs. Ry. Co., 51 Am. Rep. 286.

Defendant is not liable in this case unless advised by Bigger that he desired to transfer to I. & G. N. car.

G. C. & S. F. vs. Guess, 154 S. W. 1060.

See Ward vs. N. Y. Cent., 17 Am. Neg. Rep. 276.

"After a reasonable time in which to alight: The relation of carrier and passenger does not necessarily continue until the passenger has reached his place of destination and has actually left the car; and whether he has had time to do so may not always be decisive of the question. So, where a passenger has had reasonable time and opportunity to leave the car and does not do so, he thereby forfeits the rights due him as a passenger. Chicago, etc. R. Co. v. Barrett, 16 Ill. App. 17; Jefferson, etc. R. Co. v. Parmalee, 51 Ind. 42. And such reasonable time is the time within which persons of ordinary care and prudence, under like circumstances, get off the cars. Imhoff v. Chicago, etc. Ry. Co., 20 Wis. 344."

"If the train stopped long enough for him to get off, then the company has done all it can. Central R. Co. v. Whitehead, 74 Ga. 441." Am. & Eng. Ency. of Law. Vol. 5, Note 3, page 497, Second Edition.

In the Am. & Eng. Encyclopedia of Law, Second Addition, Vol. 5, pages 558, 559, 560, 561, as follows:

"Reduced to the simplest form, the rule may be stated to be that the carrier is bound to exercise the strictest vigilence in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit." P. 558.

"Care Proportionate to Nature and Risks of Business: Again averting to the divergent opinions of various Courts as to the degree of care required of a carrier of passengers, attention is drawn to certain cases in which it is said that the degree of care is subject to a reasonable limitation; that it is not the utmost and highest absolutely, but the highest which is consistent with the nature of the carrier's business, and there must be a due regard to its necessary requirements." P. 559.

"Special Rules and Modifications—Utmost Care and Human Foresight: In a very large number of cases it has been held that a carrier should use the utmost care and foresight in the conveyance of its passengers so as to prevent injury which otherwise might be guarded against."

NOTE—"Utmost Care and Foresight—United States: Hadard v. Chicago, etc. R. Co., 1 Biss. (U. S.) 503; Pennsylvania Co. v. Roy, 102 U. S. 451." (Page 560.)

In I. & G. N. Ry. Co. vs. Welsh, 86 Texas, the Court says:

"We will consider the first and second questions together. It is not a correct statement of the law to say that a passenger carrier is bound to 'use all possible care' to provide for the safe conveyance of passengers. Our Supreme Court has laid down the correct rule of liability in Railway v. Halloren, 53 Texas 53, in which it is said: 'Railroad Companies, however, are not insurers of the safety of their passengers further than could be required by the exercise of such a high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them,

as would be used by very cautious, prudent, and competent persons under similar circumstances.' This rule of liability is sustained by the best text writers and nearly all the adjudicated cases. Hutch. on Carr. of Pass., secs. 500, 501, 502; 2 Shearm. & Redf. on Neg., secs. 495, 496; Cool. on Torts, 768; Stokes v. Saltonstall, 13 Pet. 191; Sherlock v. Alling, 44 Iowa 201; Farish v. Reigle, 11 Gratt. 709; Hall v. Steamboat Co., 13 Conn. 326; Derwort v. Loomer, 21 Conn. 253; Fuller v. Tolbert, 23 Ill. 361; O'Connel v. Railway, 106 Mo. 482; Treadwell v. Wittier, 80 Cal. 574; Tenn. Co. v. Roe, 102 U. S. 451.

"Any number of adjudicated cases to the same effect might be added, but these are deemed sufficient to show that the rule laid down is abundantly supported by the best authorities. * * *

"In the nature of things the law must leave it to the juries in the exercise of a sound judgment, from their knowledge of men and the ordinary course of human affairs, to determine whether or not a carrier of passengers has exercised the degree of care required by law, and for that reason the charge should be such as to give the best direction to their investigation. It is within the power of raiiway corporation to secure prudent and competent persons to perform the service necessar yin carrying passengers; they can provide the methods which have been tested and found practically valuable for securing immunity from danger; they have the means of enforcing the use of methods and the exercise of this high degree of care. This the law wisely and justly requires, and the requirement should be rigidly enforced. To go beyond this is to require more than human foresight can provide, and in effect makes the carrier an insurer, which is greater liability than the law imposes upon it. The effect of the charge is to submit the case to the opinions of the jurors, not upon the evidence under the law, but opinions are not controlled by law nor based upon evidence. * * *

"If the Defendant had asked a special charge contradictory of this, and it had been given, it would not have

cured the error, for the jury would have been left in doubt as to which was to govern them, and this would have been error. Railway vs. Robinson, 73 Texas 277. It does not come within the rule laid down in Robinson v. Varnell, 16 Texas 388; Linn v. Wright, 18 Texas 317, and numerous cases on that line."

American & Eng. Ency. of Law, Vol. 5, page 571:

"Duty of Passenger to Inform Himself: It is the duty of a person about to take passage on a train to inform himself when, where, and how he can go and stop according to the regulations of the company, and if he makes a mistake not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy for the consequences ensuing therefrom."

NOTE—"Duty of Passenger to Inform Himself: Hall v. McFadden, 19 New Bruns. 340; Texas, etc. R. Co. v. Ludlam, 57 Fed. Rep. 481; Little Rock, etc. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. R. Cas. 10; Chicago, etc. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60; Pittsburg, etc. R. Co. v. Nudum, 50 Ind. 141, 19 Am. Rep. 703; Ohio, etc. R. Co. v. Applewhite, 52 Ind. 540; Atchison, etc. R. Co. vs. Gants, 38 Kan. 608, 5 Am. St. Rep. 780, 34 Am. & Eng. R. Cas. 290; Logan v. Hannibal, etc. R. Co., 77 Mo. 663; Beauchamp v. International, etc. R. Co., 56 Tex. 239, 9 Am. & Eng. R. Cas. 307; Plott v. Chicago, etc. R. Co., 63 Wis. 511."

"It is undoubtedly true that where some trains make general and some only partial stoppages, the passengers should not disregard reasonable means of information in regard to his proper course." Lake Shore, etc. R. Co. v. Pierce, 47 Mich. 277, Am. & Eng. R. Cas. 340.

We insist that it was the duty of Bigger to have made inquiry and even after he had reached Longview and found that the train was being switched, his failure to insist on being transferred in the train so as an opportunity to the Railroad Com-

pany, if proper, could have been given to it to transfer him in the train by returning it for that purpose and his failure to do so was a waiver of any right he had to insist upon the same.

Am. & Eng. Ency. of Law, Vol. 5, p. 576:

"Failure of Passengers to Demand That Cars Be Backed: If a passenger, who has been carried past his station, has notice of the nature of the place where he is asked to get off, which, to his knowledge, is dangerous, his failure to object to alighting there will amount to a waiver of his right to be carried back."

"1. Waiver of Right to Be Carried Back: In Winkler v. St. Louis, etc. R. Co., 21 Mo. App. 99, a passenger was apprised of the place where he was asked to get off and of the existence of a trestle between that place and the station, and it was held that his failure to object to alighting there amounted to a waiver of his right to be carried back."

"If a passenger who has been carried beyond his station gets off without objection, and without requesting that the train be run back to the depot, the company is not liable. Gulf, etc. R. Co. v. Head, 4 Tex. App. Civ. Cas. 209."

"In Lewis v. London, etc. R. Co., L. R. 9, Q. B. 66, it was held that where the arrival of the train was announced by the servants of the company, but at the time it had passed beyond the platform, and the Plaintiff, who was well acquainted with the station, alighted at night and was injured, and the train, only a brief interval having elapsed, backed up to the platform, the company was not liable, nor guilty of negligence. See also, to like effect, Weller v. London, etc. R. Co., L. R. 9, C. P. 126; Bridges v. North London R. Co., L. R. 6, Q. B. 377."

Am. & Eng. Ency. of Law, Vol. 5, page 645:

"Degree of Care Required of Passenger: A passenger

is required to exercise that care and regard for his own safety and security which devolves on a prudent man under the cicumstances."

"Hazard v. Chicago, etc. R. Co., 1 Biss. (U. S.) 503; Mackoy v. Missouri Pac. R. Co., 5 McRary (U. S.) 358; Little Rock, etc. R. Co. v. Cavenesse, 48 Ark. 106; Jeffersonville R. Co. v. Hendricks, 26 Ind. 288; Klutts, v. St. Louis, etc. R. Co., 75 Mo. 642; Curtis v. Detroit, etc. R. Co.,27 Wis. 158."

White on Personal Injuries on Railroads, Vol. 2, Sections 19 and 20, pages 944-5, lays down the doctrine as follows:

"But the carrier is not bound to insure its passengers a safe exit from the depot or platform, across its right of way, until he shall have passed off of its property; it is required only to furnish a reasonably safe passageway to and from its trains and it is under no legal obligation to see personally to the safe exit or entry of its passengers, providing a reasonably safe way is provided for their use."

"Degree of Care Required. A carrier of passengers by steam is required to exercise a very high degree of care in the maintenance of a safe roadway, track, cars, bridges, and other appliances used in the transportation of its passengers, for such powerful engines of commerce entail the greatest hazard in their use, and the slightest negligence is apt to produce extreme peril; but the reason for the rule requiring such a high or extraordinary degree of care, ceases with the removal of the risk occasioning the rule itself and since depots or station grounds, in themselves, are no more dangerous places than other similar character of real property, the rule of law requiring the extreme degree of care in the safety or roadway, engines, cars and such appliances, does not apply with reference to the carriers' stations and approaches thereto, but the law is satisfied if such as are reasonably safe are provided for the use of passengers. Taylor v. Pennsylvania R. Co., 50 Fed. Rep. 755. The passenger's detention at the station or his exit to his train is

not attended with the same degree of hazard as the journey on the train and the duty of the carrier is lessened to that of a reasonable degree of care for the protection of its passengers at its stations or on its station grounds. Moreland v. Boston, etc. R. Co., 141 Mass. 31; 6. N. E. Rep. 255."

In the case of T. & P. Ry. Co. vs. Bingham, 90 Texas, 227, the Court says:

"In Seale v. Railway Company, 65 Texas 274; Chief Justice Willie says: 'If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken.' It follows, that in our opinion, the question of probable cause ought to depend upon the further question, whether a reasonably prudent man, in view of all the facts, would have anticipated the result—not necessarily the precise actual injury, but some like injury, produced by similar intervening agencies."

We insist that the Railroad not knowing of the sickness of Bigger counld not be reasonably expected to anticipate any injurious consequences to result to him by getting wet on a hot August day in Texas, and it is clear that Bigger being sick with consumption, as a prudent man would have anticipated the result to follow from his getting wet, if that indeed was the proximate cause of his injury, and he showed want of care and prudence in not protecting himself against said consequences after getting wet, as the means were at hand which could have been or might have been used by him to save himself.

See Street on Personal Injuries in Texas, Section 358:

"Where the injury could have been avoided notwithstanding Plaintiff's contributory negligence: It is a general rule that though the negligence of the Plaintiff contributing

to his injury will ordinarily defeat his recovery, yet if the Defendant, after knowing and realizing his danger, could, by the exercise of reasonable care, have avoided injuring him and fails to do so, the Plaintiff is nevertheless entitled to recoved. In such case the negligence of the Defendant subsequent to such knowledge and realization is itself the proximate cause of injury. See Ch. on Discovered Peril. In the case of Texas & Pacific Railway v. Lively, 14 T. C. A. 554. Writ of Error refused (1896), the Court of Civil Appeals, by Pleasants, Associate Justice, said: 'The rule which obtains in this State, and the one which obtains in most jurisdictions, is that a Plaintiff can only recover, where he is guilty of contributory negligence, when the Defendant's negligence is the proximate cause of the injury, when Plaintiff's dannger was made known to the Defendant in time to protect Plaintiff by the use of ordinary care, and the Defendant failed to use such care after discovering Plaintiff's danger.'"

Id., Section 396:

"Preventable damage or avoidance of loss from Defendant's negligence: It is the duty of one injured or threatened with injury by the negligence of another to limit the injurious consequences of the injury or to make reasonable efforts to avoid the injury altogether. As has been previously remarked it is a fair assumption of fact that in obedience to the first law of nature, self preservation, one will adopt a course of conduct consonant therewith; hence injurious consequences which a party might reasonably have avoided or prevented, are, in truth, excluded by the rule limiting liability for negligence to consequences the natural and proximate result of such negligence. Though, at first appearance, the remark seems more ingenious than useful, yet, upon reflection, its importance will be seen in the harmony and simplicity of the law thus disclosed. Though the rule itself is expressed in variant terms by different writers and Courts, it is believed that in actual application there is no real diversity. It has been well expressed as follows: 'The efforts which a party must make to avoid injury or to diminish his damages are prescribed and limited

by considerations of common sense, good faith and fair dealing.' Watson on Personal Injuries, Sec. 182."

Street on Personal Injuries in Texas, on the question of measure of damages, Section 394, says:

"Measure in Case of Death: Only compensatory damages for pecuniary loss are recoverable for negligently causing the death of another, embracing prospective advantage, not necessarily limited to minority in the case of a child killed; but earnings in a contemplated trade or profession are too remote. Bonnett v. G. H. & S. A. Ry., 89 Tex. 72, 33 S. W. 334. Such damages do not include loss of solace or comfort from the affection of the husband."

In Brunswick & W. R. R. Co. v. Wiggins, 113 Ga. 842 (L. R. A., Vol. 61, p. 113 and notes), the Court says:

"One of the grounds of alleged error is that the trial judge refused, on a proper request, to charge the jury that the evidence of persons in the employment of the railroad company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. Undoubtedly this is a sound proposition of law. The jury cannot arbitrarily disregard the evidence of any witness which is not contradicted by other evidence or circumstances. The jury should regard the testimony of every witness sworn. They are not obliged to believe it, but it is their duty to give the evidence of witnesses the weight to which in their opinion, as conscientious men seeking the truth, they believe it is entitled; but the employment or business of a witness affords no reason why this evidence should arbitrarily or without reason be disregarded. Western & A. R. R. Co. v. Beasen, 112 Ga. 553, 37 S. E. 363; Georgia R. & Bkg. Co. v. Wall, 80 Ga. 202, 7 S. E. 639. * * * but in any event, as a matter of law, the refusal to give the charge was error."

The Court refused to give any of the Special Charges requested, that would have directed the minds of the jury to the

really important phases of Defendant's defenses. The railway did its duty.

First. It attached an I. & G. N. car at St. Louis that came straight on to San Antonio and Bigger should have entered it at Little Rock.

Second. It attached sleepers for San Antonio at Texarkana that the sick man should have entered; he knew it was raining all along the route.

Third. Announcements were made for I. & G. N. passengers to transfer at points prior to and after reaching Longview Junction, before stopping at Longview, and ample time given at Longview itself, before switching, to transfer.

Fourth. There were suitable buildings provided at Longview station in the town of Longview to protect passengers from the weather.

Fifth. The place of alighting was first class and suitable and if some one owed a further duty to build sheds across the tracks (it may have been the I. & G. N. Ry. Company's duty, in whose favor a judgment was instructed at instance of Plaintiff and now conclusive), still there is not sufficient evidence on the point to show whose duty and the ground was sufficient to safely alight, and a still better service was afforded by transporting the I. & G. N. car for the passengers, to say nothing about the sleepers, to transport him and keep him out of the rain. It is difficult to conceive how any railroad could have done more for the safety and comfort of its passengers than was done in this instance, and yet a judgment of $15,000.00 is awarded and allowed to stand by the learned Trial Judge in this case in the face of such a splendid record shown for the accommodation of its passengers.

The facilities for travel were exceptionally good, for he had everything furnished for his care and safety, had he but availed himself of such advantages.

The hand of the Grim Reaper had touched him with a malady from which he could never recover, and it may have been he was drowsy and sleepy on the train and listless, thereby failed to hear the announcements from time to time; even Mrs. Powers heard some. It may be the rain he carelessly stepped into on a hot August day, was bad for him but as Dr. Wolff, and others say, was **not** the proximate cause of his death, yet he knew he was sick—he knew his malady, the dreadful disease that had crept into his lungs, to stay with him until his soul left his body, and so knowing, he availed himself of none of those things others used, the carrier furnished, which, if taken would have saved him from getting wet, but not his life. The carrier had no notice of his sickness.

Perhaps the travels made by him from San Antonio to Evansville and his old home, and rain and exposure and work while there and the return trip laid him out so that as he sped homeward he was too sick and preoccupied to notice signals or other things until at the very town of Longview, where his trip ended in the T. & P. train and car.

## PROPOSITION.

This Honorable Court of Appeals has erred in holding that it has no authority to pass upon the question of the excessiveness of the verdict found by a jury; for this, there is no constitutional or statutory limitation in such matters, upon its power or jurisdiction in respect to following the statute laws of Texas which provide the procedure in such cases, which do not, under the laws of Congress, prohibit the Federal Courts from following in

such cases nor prohibit this Court from following the procedure so established, but to do otherwise **is to deny a litigant by the Federal decisions a valuable right preserved by a State law.** See Assignments Nos. 36-37; Record, p. 327.

## AUTHORITIES.

Tex. Rev. Civ. Statutes, 1911, Arts. 1631-2021;

Felton vs. Spiro, 79 Fed. 576, 24 C. C. A. Rep. 327;

Railway Co. vs. Lowren, 74 Fed. Rep. 463;

Farar vs. Wheeler, 145 Fed. Rep. 483;

Felt vs. Puget Sound Rly., 175 Fed. 477;

Duke vs. St. Louis Rly., 172 Fed. 686.

On Procedure, see Rev. Stat. U. S., Sec. 914.

The Felton case is an opinion by Judge Taft, in which he discusses the duty of the Trial Court in relation to a motion for a new trial. On page 582, this language is used:

> "We come, then, to the question whether a Federal Court, in which a jury had rendered a verdict, has power to set aside a verdict, when, in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and in the exercise of legal discretion may properly do so. Upon this point, we have not the slightest doubt. This Court in Railway vs. Lowrey, 74 Federal 463, has already decided it. In an elaborate and most carefully considered opinion, Judge Lurton, speaking for the Court, points the distinction between that insufficiency in law of evidence to support an issue which will justify a peremptory instruction by the Court, and that insufficiency in law of evidence, when weighted with opposing evidence, which, while not permitting a peremptory instruction, will justify a Court in setting aside a verdict based on it, and in sending the parties to

another trial before another jury. It is apparent, from the foregoing, that the view of the learned Judge at the Circuit, expressed in the opinion of motion for a new trial, that because the Court cannot direct a verdict one way, it may not set aside a verdict the other way as against the weight of the evidence, is erroneous. Indeed, as distinctly pointed out by Judge Lurton, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former, there is no weighing of Plaintiff's evidence with the Defendant's. It is only an examination into the sufficiency of Plaintiff's evidence to support a burden, ignoring Defendant's evidence. In the latter, it is always a comparison of opposing proofs."

This is an opinion from one of the distinguished men and justices of this Continent while on an Appellate bench and should have much weight.

In the case of Duke, Judge Rogers goes fully into the principles that should govern a Federal Court in the determination of a motion for a new trial. In it a quotation is made from the Supreme Court of the United States in the case of Railway vs. Winter, 143 U. S. 60, in which it is stated that it is the province of the Trial Court to determine upon a motion for a new trial whether a verdict is excessive. A verdict of $17,500.00 in favor of the family of a man twenty-nine years of age, a brakeman and father of a family, was reduced to $6,000.00.

In the case of Felt, wherein the deceased was a stone mason, 47 years of age, with ability to earn from $6.00 to $6.50 per day, a verdict of $10,000.00 was reduced to $6,000.00.

**Under the Texas law now in force, it is made the duty of the Appellate Court to reduce the verdict when believed to be excessive. Rev. Civ. Stats., Art. 1631.** That is exclusive of the question of where the jury was improperly influenced which calls

for an additional ground to cut down. The Statute is as follows:

> "Art. 1631. Suggestion of remittitur. In all civil cases, now pending, or that may be hereafter appealed to any Court of Civil Appeals of this State, and shall be of the opinion that the verdict and judgment of the Trial Court is excessive, and for that reason only, said cause should be reversed, then it shall be the duty of such Court of Civil Appeals to indicate to the party in whose favor such judgment was rendered, or his attorneys of record, the amount of the excesses of such verdict and judgment; and said Court shall, at the same time, indicate to such party, or his attorney, within what time he may file a remittitur of such excess, and if such remittitur shall be so filed, then the Court shall reform and affirm such judgment in accordance therewith; if not filed as indicated, then to be reversed. (Acts, 1893, p. 89; see Sayles' Practice, p. 653; T. & N. O. Ry. vs. Syfan, 44 S. W. 1064; G. H. & S. A. vs. Hynes, 50 S. W. 624; G. H. & S. A. Ry. vs. Nicholson, 57 S. W. 694; Ry. vs. Linthicum, 77 S. W. 40; Ry. vs. Stevens, 94 S. W. 394; New York Life Ins. Co. vs. Herbert, 106 S. W. 421; Southwestern Telegraph & Telephone Co. vs. Gehring, 137 S. W. 754; Texas & No. Ry. Co. vs. Marshall, 140 S. W. 508.)"

On the question of new trial and remittitur on account of amount of damages, see Art. 2022, as follows:

> "Art. 2022. New trials granted where damages too small, etc. New trials may be granted as well when the damages are manifestly too small as when they are too large. (Id., Sec. 111; P. D., 1472; see Sayles' Practice, pp. 632-644; Burns vs. Mer. & Plan. Oil Co., 63 S. W. 1061.)"

To sustain its contention that this Honorable Court cannot consider the excessiveness of the verdict cites:

Alpha Portland Cement Co. vs. Curzi, 221 Federal Reporter, 587, in which it is held:

"It is urged that the verdict is excessive, and that we should reverse the judgment because the Court below did not set the verdict aside, although it was promptly asked to do so. However, the rule in the State Courts may be, this Court is not at liberty to consider whether this verdict is or is not excessive. In the Federal Courts the supposed errors of the jury can be corrected in no other way than by a motion for a new trial the decision of which by the trial judge is final and cannot be assigned as error upon appeal. The power of the Court on appeal is restricted to the determination of questions of law arising on the record. Lincoln v. Power, 151 U. S. 436; 14 Sup. Ct. 387; 38 L. Ed. 224; Wabash vs. McDaniels, 107 U. S. 454; 2 Sup. Ct. 932, 27 L. Ed. 605; N. Y., Lake Erie, etc. Ry. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; Wilson v. Everett, 139 U. S. 616, 621; 11 Sup. Ct. 664, 35 L. Ed. 286."

If the Federal Court here will not follow the procedure in such cases established by law in Texas **then it would not give equality under the law and this Defendant would be deprived in the Federal Court of a valuable right it had in the State Court. But in the face of our Statute, we cannot believe this Court should hold itself bound by the doctrine of Stare Decisis, and against the Statute.**

Is a question of law raised where the Court believes a verdict is excessive when the mandatory statute says it shall be reduced? If the Court believes that this verdict is excessive, then are we not **deprived of a valuable right under the law if it is not reduced?**

## REMARKS.

It has been held in many jurisdictions that a verdict when shown to be the result of prejudice amounting to improper conduct is reversable error, and if such prejudice were here affirmatively shown this Court would clearly have the power to reverse

the case. So stood the decision in Texas. But to prevent reversals in such cases, the Legislature of Texas placed the power in the Appellate Courts to diminish such verdicts as shown above. That procedure, from this standpoint, not only places the power in this Court to act, **but the Statute is mandatory when the Court thinks, as this verdict is, that it is excessive.**

## PROPOSITION.

The undisputed evidence showing Bigger came to San Antonio a sick man to regain his health because he could never live in Tennessee, returned to Tennessee, where he went on a return ticket over the I. & G. N. and T. & P. roads, returning over the same line upon which there was an I. & G. N. coach provided for I. & G. N. passengers which he could have entered and in which he doubtless traveled going to Tennessee and was the safer way for him to travel as he had traveled over the same route and was familiar with it, and the undisputed evidence showing him guilty of want of ordinary care in not making inquiries concerning his route, train or cars, or in not going in said car, whether the Railway was guilty or not of failure of any duty in not giving notice to transfer to the I. & G. N. car or providing sheds to protect him from the rain after leaving train, his own want of care was the proximate cause of his injury.

## AUTHORITIES.

I. & G. N. Ry. Co. vs. Edwards, 100 Tex. (Sup.) Rep. 24;

Louisville & N. R. Co. vs. Peck, 153 S. W. Rep. 40;

Russell vs. St. Louis & S. F. R. Co., 161 S. W. 638;

Stamp vs. Eastern Ry. Co. of New Mexico, 161 S. W. 450.

## STATEMENT.

The facts are undisputed that he got into a T. & P. coach at Little Rock, and remained there until he got to Longview. Here is what he and Mrs. Powers said: Mrs. Powers said (Rec., 112): "I knew J. T. Bigger. * * * I first noticed Mr. Bigger when he entered the car at Little Rock, and he rode in that car until he got to Longview." She heard announcement made at Longview to change cars for San Antonio, Rec., 112. Bigger was standing by his seat talking to Auditor and Brakeman. (Rec., 113.)

Mr. Bigger said: "I puchased said ticket in San Antonio, Texas, from the International & Great Northern Railway. Said ticket entitled me to ride as a passenger on the International & Great Northern Railway, the Texas & Pacific Railway, the Iron Mountain Railway and the L. & N. Railway. * * * Said ticket was a round trip ticket and entitled me to transportation from San Antonio, Texas, to Nashville, Tennessee, and return." (Rec., p. 102.)

He further said: "I stepped in a place used as a railroad office. * * * I was compelled to get in the rain again when I got on the I. & G. N. train after leaving the Texas & Pacific train." (Rec., p. 102.) "There was a coach in the Texas & Pacific train upon which I rode into Longview that came through to San Antonio on the line of the International & Great Northern. I know this because I saw the coach and saw people in it after leaving Longview who were not wet. They just remained in this coach and did not get off." (Rec., p. 103.)

Peter Wyatt, the porter, stated he made announcements to passengers in the Texas & Pacific car who were destined to San Antonio and other I. & G. N. points." (Rec., p. 142.) "All passengers for I. & G. N. Points will go back through the sleeper to the I. & G. N. coach, change for Houston, Galveston, San Antonio,

Austin and Laredo, * * * I assists several ladies and several gentlemen with their bags and grips from the Fort Worth (Dallas) chair car." (Rec., p. 143.)

"Mr. Bigger and the lady had plenty of time at Longview before switching was done to have gotten off or have gone back into the I. & G. N. car." (Rec., p. 149.)

H. F. Bodecker, the train Auditor, explicitely stated both he and the porter made the announcements to passengers in the T. & P. coach to transfer to the I. & G. N. chair car. (Rec., pp. 135-139.)

Upon cross-examination, he stated: "In answer to the question as to whether or not it would have been an easy matter for the employees of the company to conduct the passengers through one or two sleepers back to the I. & G. N. coach, rather than allowing them to get out in the rain, if it was raining, I will say that the employees did do that. I stood between the first car and the Texas & Pacific chair car and assisted several ladies across there myself." (Rec., 139.) Also see his re-direct (Rec., 140) and re-cross examination (Rec., 141) to the same effect. Stated also: "I was standing at the end of the El Paso sleeper, next to the Texas & Pacific car, when the people were leaving it at Longview. The switch engine had not taken charge of the train at that time when I assisted these people across. The porter carried the passengers' baggage through and I assisted them. I could see that all passengers did not leave and some of them were not supposed to leave." (Rec., p. 141.)

R. H. Adkins, the conductor, stated, among other things: "There was nothing to prevent passengers from walking through the sleepers in the day time or at night either. We do not keep the doors locked, but we keep the doors open so that the train crew can pass backwards and forwards." (Rec., pp. 155-6.)

J. E. Barnett, brakeman, gave notice to passengers at Texarkana to change cars. (Rec., p. 97.) The Texas & Pacific car and the I. & G. N. came to Texarkana coupled together, and at Texarkana an I. & G. N. car is put on the rear end of the train and the Pullman car going to El Paso on the Texas & Pacific is put between the I. & G. N. car and the Texas & Pacific car. Then when the train reaches Longview Junction the I. & G. N. car is taken off the rear end of the Texas & Pacific train and placed on the I. & G. N. train. The train is arranged at Texarkana in order to avoid switching at Longview Junction." (Rec., 78.)

## REMARKS.

It is therefore undisputed that announcements were made. There is nothing to show to the contrary, though it may be claimed Bigger did not hear them. But we say even though not made, he could not have relied on mere signals. It was his duty to make inquiries. (I. & G. N. Ry. Co. vs. Edwards, 100 Tex. (Sup.) Rep. 24, supra.)

The law required him to use his faculties. It is clear even when he reached Longview he had time to transfer from the T. & P. coach. He made no effort to learn anything. They simply kept their seats in the car; at least, Mrs. Powers did until she was admonished by the porter. Peter Wyatt asked where she was going and "why didn't you transfer?" (Rec., p. 143.) She had heard the announcement made at Longview to change for **San Antonio** (Rec., p. 112) and he could then have changed or requested the conductor to have car returned to transfer him as he was a sick man, by **so stating.** All others and the conductor had left the train and on the outside at the depot.

There should have been, under the evidence, an instructed verdict for the Texas & Pacific road just the same as there was for the International & Great Northern Railway.

What was the proximate cause of the injury. Was it (a) that Bigger, a sick man and a consumptive, left San Antonio before he had recovered his health and risked such a trip? (b) Was it the negligence of either one of the Railways (which one) to build a shed over the tracks to protect people from getting wet? (c) Having purchased a return ticket from the I. & G. N. Ry. Co. and having left the T. & P. train, and got wet before he reached the shed, then again got wet after leaving the shed to get on I. & G. N., whose passenger was he? When did he cease to be the passenger of the T. & P. Ry. Co. and become the I. & G. N. passenger at that depot? (d) Though the T. & P. Railway may be held by this Court the negligent one, was it any more negligent and careless than Bigger? The rainfall was unprecedented. It was the act of God.

There was a safer course for Bigger had he inquired or used any care. The railway had provided it.

As to safer way, see:

## AUTHORITIES.

City of Dallas v. Moore, 74 S. W. 95;

Thompson on Neg., 6218-1947.

We hear no word of complaint from him from Longview to San Antonio to the I. & G. N. conductor. The verdict should have been, under the undisputed evidence in this case, instructed for the Defendant, as it was for the other Defendants, and we here confidently request that the judgment be reversed with instructions, if not rendered.

George Thompson

By T. M. Cobbs, of Cobbs, Eskridge & Cobbs.

Attorneys for Petitioner.

# TEXAS & PACIFIC RAILWAY COMPANY *v.* BIGGER.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 342. Submitted November 30, 1915.—Decided December 13, 1915.

Where the case was tried to a jury and there was a verdict for plaintiff, disputed questions of fact must be considered by the appellate court as determined against defendant.

On appeal from a judgment of the Circuit Court of Appeals affirming a judgment of the trial court based on a verdict, this court is confined to considering questions of law arising on the rulings of the court.

A defendant removing the case from the state court, and not reserving any exception to the jurisdiction of the state court, cannot after pleading in, and submitting to the jurisdiction of, the Federal court raise the question of the original jurisdiction of the state court.

A general contention that the trial court should have directed a verdict for defendant involves the whole case, and facts and law may, as in this case, be so intermingled as to make the latter dependent upon the former.

A carrier which has accepted a passenger to a definite point does not discharge its duty by delivering him in an unsuitable place without protection from the inclemency of the weather.

There having been conflicting testimony whether plaintiff's intestate

was or was not necessarily compelled through the negligence of the defendant carrier to submit to conditions resulting in his sickness and death, and the court having charged that if the jury believed the defendant's testimony in that respect, plaintiff could not recover at all, and if plaintiff's evidence was true it appears that defendant did not exercise even ordinary care, a verdict for plaintiff should not be set aside because of statements in the charge in regard to different degrees of care owed by the defendant under varying circumstances to its passengers.

218 Fed. Rep. 990.

THE facts, which involve the validity of a judgment of the Circuit Court of Appeals in an action for injuries sustained by a passenger against a carrier, are stated in the opinion.

*Mr. George Thompson* and *Mr. T. D. Cobbs* for plaintiff in error.

*Mr. H. C. Carter* and *Mr. Perry J. Lewis* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for personal injuries brought by J. T. Bigger against plaintiff in error and the International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company in the state district court of Bexar County, Texas.

The case made by Bigger's pleading was this:

Bigger was a passenger upon the Texas & Pacific Railway Company's train on a ticket from San Antonio, Texas, to Owensboro, Kentucky, and return, having purchased the ticket from the International & Great Northern Railway Company, at San Antonio, Texas. A partnership was alleged between the companies.

Bigger was returning from Owensboro to San Antonio and was compelled and required to leave the train at

Longview during a very severe downpour of rain at a place where there was no protection. His clothes became thoroughly drenched with rain, and he was required to ride in them so drenched until he reached San Antonio at about 10 o'clock at night. As a result of such exposure and wetting he became seriously ill.

At the time the Texas & Pacific reached the station at Longview there was in the train a car destined to San Antonio, on the line of the International & Great Northern Railway, of which the employés of the Texas & Pacific knew but they neglected to inform Bigger of the fact and give him an opportunity to transfer to such car.

It was charged in his complaint that such facts constituted negligence on the part of the company and its employés.

In accordance with a petition by the Texas & Pacific Company the case was removed to the United States district court for the western district of Texas. There an amended petition or complaint was filed suggesting Bigger's death and his wife and six children were made parties plaintiff.

The St. Louis, Iron Mountain & Southern Railway Company filed a separate demurrer and answer.

The International & Great Northern Railway Company and the Texas & Pacific Railway Company joined in a general demurrer and in an answer to the merits. Subsequently both of the latter companies were given leave to amend and availed themselves of it. The answer of the Texas & Pacific Railway Company contained a general demurrer, a general denial of the allegations, and set up special matters in defense. It contained no plea or exception to the jurisdiction of the court, state or Federal.

The case was continued and set for trial upon motion of defendants, and the Texas & Pacific Railway Company then filed a second amended answer in which it set up that it was incorporated under an act of Congress, had

its domicile in Dallas, Texas, that no part of its road was in Bexar County, and therefore the action was improperly brought in the latter county and the court was without jurisdiction to try it, it being "one arising under and involving damages for personal injury." Insufficiency of the petition in law was also alleged and that the petition showed on its face that the company was a common carrier without any elements of partnership existing between it and the other defendants. The answer also contained general denials of the allegations of the petition and averred besides that Bigger had ample opportunity to transfer from one coach to another and that had he used ordinary care he would have got into the proper coach either when he first boarded the train or at some time during passage. That the railway company complied with its duty when it safely transported Bigger to Longview and at that station its relation to him, so far as he was a passenger, terminated, as he was entitled to ride to such point and no farther.

That it stopped its train at the usual place and the station building and shelter from rain was in close proximity to such point. That other passengers alighted and proceeded to such station building, that there was no reason why Bigger should not have done so and that his exposure was due to his own negligence.

That his ill health and subsequent death were not caused by nor were they the result of any negligence of the company but that he was in an extremely poor state of health, having been the victim for a long time of a tubercular infection which had so far progressed that he had been compelled to give up his work and return to San Antonio, with hope practically abandoned, and that his death was the proximate and direct result of such infection.

Upon the issues thus joined the case was tried to a jury. The court directed a verdict for all of the companies

except the Texas & Pacific, against which company a verdict was returned in the aggregate amount of $15,250.00, the amounts awarded to the wife and children being respectively specified. Judgment was entered accordingly and affirmed by the Circuit Court of Appeals.

A motion is made to dismiss or, alternatively, to affirm.

The motion to dismiss is overruled. The railway company is a Federal corporation and the questions raised are not frivolous.[1] We pass, therefore, to the merits.

The questions of fact must be considered as determined against the company by the verdict of the jury, that is, that Bigger was required to get off the train at Longview in a drenching rain, that the accommodations there were insufficient for the protection of passengers, that he could have been transferred to a coach attached to the train but was not, nor was he told of it, and that the exposure resulted in his death. And, further, the verdict is conclusive as to the condition of his health and as to the expectancy from his life.

Our consideration, therefore, must be confined to the questions of law arising on giving or refusing instructions, or on some other ruling of the court. There is such other ruling. The company in its second amended answer in the district court excepted to plaintiff's petition on the ground that it showed on its face that the suit was improperly brought in Bexar County. The exception was overruled and this is assigned as error. It was not error. The petition for removal contained no reservation of a question of the jurisdiction of the state court and after the case reached the district court there were pleadings to the

[1] This case was pending in this court before and at the time of the passage of the act of January 28, 1915, 38 Stat. 804, c. 22, §§ 5 and 6, which takes away from courts of the United States jurisdiction in suits by or against any railroad company on the ground that such company was incorporated under an act of Congress. The act excepts actions or suits pending at the time of the passage of the act.

merits and other action submitting to the jurisdiction. *Tex. & Pac. Ry* v. *Hill*, 237 U. S. 208.

There is the general contention that a verdict should have been directed for the company. The contention involves the whole case, and facts and law are so intermingled as to make the latter inseparably dependent upon the former. For instance, it is urged that Bigger did not exercise care when he boarded the train at Little Rock. He could have known, it is said, that there was an International & Great Northern coach attached to the train and that he should have heard the announcement to passengers to transfer to that coach; and "should at some time during the route have looked and listened." The announcement is disputed, and whether he should have known of the International & Great Northern coach, was for the jury to decide.

There is testimony to the effect that Bigger was required to get out at Longview during a rain of such severity as to amount to a cloudburst and which had covered the ground with water. Against this, it is said that where he descended from the train was a suitable place to walk and that there were sheds and depots and other buildings near at hand to protect him from the rain. And it is urged that he should not have continued his journey in wet clothes; that he could have changed clothes at a hotel in Longview or sought the accommodations of a Pullman sleeper. Finally it is said that the Texas & Pacific owed him no further duty when he left its train. The latter contention can be immediately rejected. The company accepted him as a passenger for a destination beyond Longview and its duty was not discharged by delivering him to a storm, protected from its inclemency only by the shelter afforded by a "switch shanty," so-called by an employé of the road. We may remark that to that shanty a lady passenger was also conducted by the porter of the train, he apparently not having knowledge of the existence

of other buildings which the company alleged were available to Bigger. The lady testified that the water was "three inches deep on the ground" and came to her ankles and that "it was raining just like a cloud-burst." Nor was it a condition suddenly occurring. It rained before the train reached Longview, "and the tracks looked," the witness said, "like they were covered with water." And, we may say, as indicating the severity of the storm, the train was compelled to return to Longview on account of washouts. Such conditions of discomfort and peril to health she, Bigger, and, it appears, two other passengers, were required to pass to and endure in order to take a car which was attached to the train and which could have been reached by merely passing through other cars. And these were the conditions a jury had the right to believe existed, although there was contradiction of them. The other contentions involved considerations for the judgment of the jury.

There is an objection to the charge of the court that it gave too much emphasis to the duty of the company and not enough to the duty of Bigger as a passenger. The objection involves the charge as a whole, and, as it would be inconvenient to quote it, we simply say that the objection is not justified. The court expressed the elements of liability of the company, and it expressed as well the conditions of recovery on the part of plaintiffs, and it is hypercritical to say that the emphasis was more on one than on the other, as presently will be shown.

The most important contention of the company is based on the charge of the court as to the degree of care required of the company. The court said that if Bigger's "illness and subsequent death did not result directly from the negligence of the defendant, they [plaintiffs] would not be entitled to recover." And, it was added, "What then is negligence? It is the failure to do what a reasonable person would ordinarily have done under the circumstances of

the situation, or the doing what such person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or in commission. The duty is dictated and measured by the exigencies of the occasion."

The court recited the evidence and the contentions of the parties and said that it was the duty of the company "to provide adequate and safe accommodations for passengers where they could alight to change cars and where they could be protected." And, further, that if this was done the company had fulfilled its duty and no recovery could be had against it. If it had not done so, and, "if the employés of the defendant required the deceased to get off the train in a severe rain, and his illness resulted therefrom without any fault or negligence on his part, the plaintiffs would be entitled to recover." And it was said: "In this connection you are further instructed that the deceased was required to look out for his own comfort and safety; and if he was in any respect guilty of negligence contributing to his illness and death, then no recovery can be had by the plaintiffs in this proceeding."

The court, at the request of the company, further instructed the jury that if Bigger at the time he entered the car was sick with lung trouble and knew there were chances of injury by exposure and he neglected to use ordinary care and prudence to protect himself against any contingency which might arise during the journey, and if he changed cars when by the use of ordinary care he could have avoided doing so or if there was a safer way for him to have gone, which he might have ascertained by ordinary care, the company would not be responsible for the injury which resulted, if any resulted. And further that "all these facts and circumstances in connection with his [Bigger's] condition" should be considered in determining "whether or not he used that ordinary care and prudence which an ordinarily prudent person would have exercised

under similar circumstances." To these instructions there was no objection except to that part which extended the duty of the company to the protection of passengers after they had alighted from the train.

But the court instructed the jury, at the request of plaintiffs, that the railway company "owed its passengers the duty to exercise that high degree of care that would be exercised by every prudent person under the same or similar circumstances, and a failure to exercise such degree of care would be negligence." This instruction is attacked as error only because it imposed a high degree of care on the company after Bigger had left the train "and was therefore in a position to use care in taking care of himself." The ground of the objection seems to be that the duty of the company ceased upon the arrival of its train at Longview. To this, as we have already said, we cannot assent. The same care was necessary to be observed for Bigger's protection at that place, under the circumstances presented by the record, as was necessary to be observed in his transportation, and the charge of the court correctly expressed it. *Penn. Co.* v. *Roy*, 102 U. S. 451; *Indianapolis &c. R. R.* v. *Horst*, 93 U. S. 291.

But even if the railway company could plead a lesser degree of care than that declared to be its duty in the charge of the court, it is very disputable if error was committed to the prejudice of the company. Between the plaintiffs' ground of action and the company's ground of defense there was a clear line of distinction. The testimony of plaintiffs was to the effect that Bigger was compelled to descend from the train in the midst of a severe storm to the inadequate protection of a mere shanty to await the car for San Antonio, such car being attached to the train he was on and to which he could have gone by simply passing through other cars had he been told that it was part of the train. The company asserts that he was told and that he disregarded the information. If the latter

was true the company was not liable, and the court so instructed the jury. If the testimony of plaintiffs was true the company did not observe even ordinary care; and which was the fact it was for the jury to decide, and their judgment in deciding could not have been embarrassed by a consideration of degrees of negligence or care.

The other contentions of the company we think do not require special comment. They are directed to the proposition, many times repeated, that the company owed no duty to Bigger or else had observed it, and that Bigger had not used care either in avoiding exposure or in preventing an injurious effect from it. They attack the sufficiency of the evidence and assert, in effect, that its conflicts should be resolved against plaintiffs. The propositions of law involved are those which we have considered.

*Judgment affirmed.*

The CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent, because they are of opinion that some of the instructions complained of laid upon the carrier a heavier duty than the law recognizes.